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POWER OF A COURT OF EQUITY TO RESTRAIN THE OFFICERS OF A LABOR UNION FROM CALLING A STRIKE ON INTERSTATE RAILROADS.

Much excited and unreasonable comment has been provoked by the recent order of Judge Elmer B. Adams of the United States Circuit Court in the recent case of Wabash Railroad Company v. Hannahan, *et al.* The order in this case, a temporary injunction against the leaders of certain labor organizations, was the outcome of a threatened strike of trainmen and trackmen of the Wabash Railroad. There was no agreement on the part of the employes of the Wabash Railroad to quit work; in fact, it was asserted that many of the employees had no desire to quit, but would be compelled to do so if the officers of the labor union to which they belonged should call the men out. So it resulted that the railroad company were compelled to treat with purely outside parties threatening to tie up their whole system by calling a strike of the men on their road, unless they acceded to certain demands by a certain day. Confronted with this state of facts, the railroad company resolved upon a bold and somewhat unusual course. They applied for a temporary restraining order, not against their own employees for conspiring to quit their employment at one time, but against the officers of two labor unions to which their men belong, commanding them not to call out or induce their men to strike, and alleging as a reason for such a remarkable order, not that there was any illegal conspiracy against them, but that the contemplated acts of defendants would compel the plaintiff to violate the provisions of the Interstate Commerce Act. The full text of the remarkable order made in this case was as follows:

"Now on this day this cause coming on to be heard on the motion of complainant for a preliminary restraining order or injunction, as prayed for in said bill, and complainant having exhibited its sworn bill to the Hon. E. B. Adams, Judge, and this court, being now fully advised in the premises, and having heard read said bill, it is ordered that a writ of injunction issue out of, and under the seal of this court, commanding said defendants, John J. Hannahan, *et al.*, and each of them, individually and as representatives of the Brotherhood of Locomotive Firemen, and Brotherhood of Railroad Trainmen, their representatives, clerks, agents and attorneys, and all others who may be aiding and abetting, or acting in concert with them, and under their direction, absolutely to desist and refrain from in any way or manner ordering, coercing, persuading, inducing, or otherwise causing, directly or indirectly, the employees of the Wabash Railroad Company, complainant, engaged in or about the operation of its trains with the United States, as brakemen, switchmen or locomotive firemen, to strike or quit the service of said company, and from in any way molesting or interfering with said company's said employees, or with the operation of its trains, or conduct of its business as a common carrier, and from molesting or interfering with said railroad company, its officers, agents or employees, in respect to the operation of its trains, or the employment of men for or in connection therewith or from preventing or interfering with said company in the carrying out of its contracts of employment with its employees, and its contracts with shippers for the transportation of property, and from interfering with or preventing said railroad company from affording reasonable, proper and equal facilities for the interchange of traffic between its lines of railroad and other lines of railroad connecting therewith, and receiving, forwarding and delivery of passengers and property to and from its lines of railroad with other railroads connecting with such lines, and making a continuous carriage of freight from the place of shipment to the place of destination, and from preventing or interfering with such railroad company's connecting lines and their employees, in the like interchanges of traffic and facilities with said Wabash Railroad and from ordering, advising, or otherwise influencing employees of such connecting lines to refuse to interchange traffic and afford facilities therefor, and from interfering with or preventing said Wabash Railroad and its connecting lines from complying with the requirements of the Interstate Commerce Act of the United States, and with their said agreements with each other in respect to said facilities for the interchange of

traffic, and the receiving and interchanging of traffic, and from interfering with or preventing said railroad company in the carrying of the mail in accordance with its contracts with the United States, and the laws relating thereto, to the end that by any of the acts or means aforesaid, the said defendants, their agents or servants shall not interfere with said railroad company in the discharge, or prevent said railroad company from discharging its duties and obligations with respect to interstate commerce, or prevent it from performing any or all its duties or obligations imposed by the Act of Congress approved Feb. 4, 1887, and amendments thereto in relation to interstate commerce."

It is well settled of course that workmen have the right to combine for their own protection, and to persuade in a reasonable manner fellow workmen to join them or to refrain from taking the places made vacant by them. On the other hand it is equally well settled that workmen who have left the employ of their former master, have no right to attempt by coercion or intimidation to prevent others from taking their places. Many authorities familiar to every member of the profession might he cited in support of both these propositions.

The point, however, involved in the temporary restraining order issued by Judge Adams, has never to our knowledge been passed upon. This order virtually asserts the right of a court of equity to prevent even the calling of a strike by the officers of a labor union when such strike would seriously affect the operation of the mails or interfere with interstate commerce. It has been held that ordinarily the officers of a labor organization cannot he enjoined from calling a strike or assisting the carrying on of the strike by the disbursements of funds. Cumberland Glass Mfg. Co. v. Bottle Blowers Assn., 59 N. J. Eq., 49, 46 Atl. Rep. 208; Levy v. Rosenstein, 66 N. Y. Supp. 101. It would certainly be a gross interference with the constitutional liberty of any person to prohibit him from advising another to quit any employment he may be engaged in at the time. And certainly, if a labor union is not an illegal combination or organization, their officers who are given certain powers in advising or calling a strike by the constitution and by-laws cannot be enjoined from peacably exercising these powers whenever they see fit.

But in the order of Judge Adams a new element is injected,—the effect of the exercise of such powers on interstate commerce or other interests of the state or national governments. So long as only private interests are involved there can be no question that a court of equity could have no basis for making such an order unless, as we indicated in a previous editorial, great danger to life or property might result. 56 Cent. L. J. 101. The Interstate Commerce Act imposes certain obligations upon common carriers, such obligations existing for the benefit of commerce throughout the whole country. If labor organizations controlling the labor of the great railroad systems of the country should become so powerful as that by their word they could throw out of employment every available man for such work in the United States, it is not difficult to imagine how easily the wheels of commerce could be stopped, mails delayed and every provision of the Interstate Commerce Act rendered nugatory. A few years ago to have mentioned such a thing as possible would have brought upon him who made the statement the ridicule of the whole country. Now, however, the question is becoming a serious one. Labor unions are being regarded with as much, if not greater apprehension, as trusts, and are only tolerated as we sometimes tolerate the injection of one poison into the system as an antidote to another already there. How often the whole country has been prostrated before the feet of a small coterie of men who, exercising a little brief authority conferred upon them, have by their action stagnated sometimes the most vital business interests of the nation. If, as this power increases, its exercise begins to conflict seriously with interstate commerce or any other public interest, have not the federal courts whose duty it is to protect these interests the power to assume to exercise the most prompt and effective remedy against the threatened injury? Many jurists who have professed to see so much of evil in the use by the federal courts, of the writ of injunction, would do well to think more seriously on the impotency of the people when, in the merciless clutch of a partisan organization controlling the labor of the country, every national interest is paralyzed and no effective remedy at hand to protect the rights of the people.

NOTES OF IMPORTANT DECISIONS.

FRAUDULENT CONVEYANCES—CONVEYANCE OF MINING PROPERTY FOR STOCK IN MINING CORPORATION.—The transfer of property in exchange for stock in a corporation, where such payment for stock is not prohibited by statute, is not *ipso facto* a conveyance fraudulent as to existing creditors. Such was the interesting point of the decision in the recent case of Homestead Mining Company v. Reynolds (Colo.), 70 Pac. Rep. 422. In this case two debtors owning several mining claims conveyed them to the defendant mining corporation in consideration of stock in such corporation. This conveyance was made just prior to the rendition of a judgment against them, but there was no evidence of any actual intention to defraud. The court said:

"No claim is made nor does the proof show, that there was an actual intent on the part of the judgment debtors to perpetrate a fraud upon their creditors, and, if there was fraud at all, it was what plaintiff denominates fraud in law; in other words, the necessary effect of the conveyance was a legal fraud, in that it left the judgment debtors without sufficient property to pay their existing indebtedness. The action was not in any sense grounded upon the proposition that the conveyance in question was a deed of gift made in trust for the use of the donor, which would be void under section 2024, Mills' Ann. St., and appellee's claim that the case comes under that section is not borne out by the pleadings or the evidence. It was incumbent, therefore, upon the plaintiff, having adopted the theory just mentioned, to prove that the conveyance was purely voluntary, or that it was made with the intention to delay and defraud creditors. There are allegations in the complaint that the conveyance to the corporation was for the purpose of putting the property beyond the reach of the creditors of Wall and Pursel; but the mere fact — and there is no other proof—that the corporation paid no money, but issued its stock in payment for the property, is of itself not proof of such intent, because it is a method of transacting business permitted by the statute."

MUNICIPAL CORPORATIONS—CITY AS TRUSTEE OF PUBLIC CHARITY UNDER A WILL. — Can a city act as trustee of a public charity under a will? Such was the question before the Supreme Court of Colorado in the recent case of Clayton v. Hallett, 70 Pac. Rep. 430. In this case, a testator gave his residuary estate to the city of Denver in trust for the establishment of a college for the education of orphan boys in the county and state. By the laws of the state the maintenance of schools was left to the school districts. Testator died in 1889. The city had no express authority in its charter to acquire and hold property, except as necessary for the public use of the inhabitants. But the charter provided for the assistance of charitable organizations, and for the general good government of the city. The court held that, the trust being germane to such objects, the city was authorized under its charter to accept and execute the trust.

This decision is in line with the authorities. Stephen Girard died in the year 1831, and by his will devised and bequeathed to the city of Philadelphia the residue of his estate in trust for the establishment and support of a permanent college for the education of poor white male orphans. This devise was sustained by the Supreme Court of the United States, and the court held that "the corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust." Vidal v. Girard's Exrs., 2 How. 127, 11 L. Ed. 205. Bryan Mullanphy died in the year 1851, and by his will devised and bequeathed the undivided one-third of his property to the city of St. Louis in trust, "to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way to settle in the West," and this trust was sustained by the Supreme Court of Missouri in the case of Chambers v. City of St. Louis, 29 Mo. 543. Charles McMichen, a citizen and resident of Cincinnati, made his will in 1855, and died in 1858 without issue. He devised certain real and personal property to the city of Cincinnati and its successors in trust, forever, for the purpose of building, establishing, and maintaining, as far as practicable, two colleges for the education of boys and girls. The Supreme Court of the United States, in Perin v. Carey, 24 How. 465, 16 L. Ed. 701, held that this was a valid devise, and that "the city of Cincinnati, as a corporation, was capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMichen." Upon this subject of he authority of municipal corporations to administer a trust, Mr. Justice Wayne, speaking for the court, said: "If the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such a trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers."

In speaking of the cases just cited the court in the principal case said: "The sections of the charter of Philadelphia, Cincinnati and St. Louis quoted in the cases cited show that the charters of these cities and the charter of Denver are practi-

cally alike. In each is contained the general provisions found in nearly all charters that tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness. If the city of Philadelphia can hold property in trust for the education of poor white male orphans, and the city of Cincinnati can lawfully execute a trust for the education of boys and girls, and the city of St. Louis can, without violating its organic law, administer a trust "for the purpose of furnishing aid to poor imigrants" passing through the city, there is no apparent reason why Denver, under her charter, which provides for the entertainment of visitors (trade), for the encouragement of manufactures (industry), for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city, accept and execute a trust for the education of poor white male orphans."

STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE IN GRATUITOUS PASSES.

Can a railroad company or other common carrier which undertakes the transportation of persons gratuitously, lawfully stipulate against liability for injuries inflicted on such persons by the negligence of itself or its employees? It is clear on principle that a contract against the consequences of future wilful wrongdoing cannot protect the guilty party,[1] and the same rule is applied in cases of negligence so gross as to imply wilfulness, or which constitutes a violation of the criminal law.[2] It is not permitted that a person should contract for immunity in the commision of crime or the indulgence of his wicked desires.

Neither is a carrier permitted, by any stipulation or the insertion of any conditions in its contract to make a release from liabilities imposed on it by law a condition of undertaking the performance of its legal duty to transport persons or goods.[3] But, on the other hand, the right of a carrier, under some circumstances, to stipulate against liability for ordinary negligence is generally recognized. Thus, where a common carrier, as a matter of accommodation or special engagement, undertakes to carry something which it is not his business to carry, or to perform some duty not imposed on him in his capacity as a common carrier, he may become a mere private carrier or bailee for hire, and only liable as such.[4]

Since it is not a part of a common carrier to transport express messengers in charge of property entrusted for transportation to their employers,[5] nor porters in charge of sleeping cars run over the railroad by other companies,[6] when a railroad company undertakes to do so by special contract, a condition in the contract exempting the company from liability to employees of the express company or sleeping-car company for injuries caused by the negligence of its own employees is valid, and if assented to by the employees of the other company, binds them.[7] The same rule is applied where a railroad company hauls the cars and property of a circus over its road under a special contract with the owner by which the carrier is not to be liable for negligent injuries to such property[8] or to employees riding in the cars.[9] But in the absence of a special agreement, a common carrier will be held liable as such to any person it may accept as a passenger, without regard to any legal obligation on its part to accept him in that capacity,[10] and whether any consideration was paid for his passage or

[1] Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 501.

[2] Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. Rep. 282; Illinois Central R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133; Starr v. Great Northern R. Co., 67 Minn. 18, 69 N. W. Rep. 632.

[3] The authorities on this proposition are too numerous to require citation.

[4] Louisville, etc., R. Co. v. Keefer, 146 Ind. 21; Russell v. Pittsburgh, etc., R. Co. (Ind.), 61 N. E. Rep. 678, 681; Robertson v. Old Colony R. Co., 156 Mass. 525, 32 Am. St. Rep. 482; Coup v. Wabash, etc., R. Co., 66 Fed. Rep. 506, 30 L. R. A. 161; Railroad Co. v. Lockwood, 17 Wall. (U. S.) 377; *Contra:* Gulf, etc., R. Co. v. McGown, 65 Tex. 643.

[5] Louisville, etc., R. Co. v. Keefer, 146 Ind. 21, 26; Sargent v. Boston, etc., R. Co., 115 Mass. 416; Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. Rep. 650, 32 Am. St. Rep. 482; Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. Rep. 633; Express Cases, 117 U. S. 1; Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. Ed. 560; Pittsburg, etc., R. Co. v. Mahoney, 148 Ind. 196, 200; Blank v. Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. Rep. 332.

[6] Russell v. Pittsburg, etc., R. Co. (Ind.), 61 N. E. Rep. 678.

[7] See authorities cited above.

[8] Forepaugh v. Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. Rep. 503, 5 L. R. A. 508; Coup v. Wabash, etc., R. Co., 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. Rep. 215; Chicago, etc., R. Co. v. Wallace, 66 Fed. Rep. 506, 30 L. R. A. 161.

[9] Coup v. Wabash, etc., R. Co., 56 Mich. 111; Robertson v. Old Colony, etc., R. Co., 156 Mass. 525, 31 N. E. Rep. 650, 32 Am. St. Rep. 482.

[10] Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346, 352 and authority; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339; Blair v. Erie R. Co., 66 N. Y. 313, 318; Seybolt v. New York, etc., R. Co., 95 N. Y. 562; Mellor v. Missouri Pacific R. Co. (Mo.), 10 L. R. A. 36.

not.[11] And when the agreement to carry is made upon a consideration as part of or collateral to some other contract incident to performing the duties of a common carrier, a stipulation relieving the carrier from liability for negligence is void, although what purports to be a free pass is given to the passenger instead of a ticket. Thus the holders of "stock drover's passes," issued to persons accompanying shipments of live stock on which the usual rates of freight have been paid are entitled to protection as passengers, notwithstanding any stipulation to the contrary.[12] The freight paid is regarded as payment for the transportation of the shippers as well as the carriage of the live stock, and the undertaking to carry imposes upon the company all the obligations to use care and diligence to avoid inflicting injury on the passengers to which common carriers are subject, even though the shipper rides in the caboose of a freight train on which his stock is carried.[13]

Nor is it essential that the shipment of freight, in consideration of which the pass is given, shall be live stock. It may be goods of any description.[14] The same rule applies where an employee is given a pass as partial compensation for his services, or is being carried from one place to another at the request and for the benefit of the carrier,[15] and where a pass is given in payment for property sold or leased to the carrier,[16] or upon any other valuable consideration.[17] But in New York it is held that a condition in a shipper's pass, exempting the carrier from liability for negligence, is valid where the special contract was made in consideration of a reduction in the cost of transportation to less than the tariff rate.[18] Postal clerks, riding on passes, have been held to be passengers, and entitled as such to damages for personal injuries,[19] in the absence of a special contract relieving the carrier of liability, except in states where, by statute, mail agents are placed on the same footing as the carrier's employees.[20] Though riding on passes, they are clearly not carried gratuitously, because the price paid by the United States for the carriage and care of the mail includes payment for the transportation of the mail agents.[21] But a special contract against liability would seem to be entitled to the same effect in relieving a carrier from liability to a postal clerk, as in the case of an express messenger,[22] or sleeping-car porter.[23]

In view of the principles above laid down, that a common carrier may undertake the performance of duties not imposed on it by law, and that in doing so it acts merely as a private carrier, and has the same freedom of contract in relation to the terms on which it will undertake such duty as a private individual, it follows that unless a common carrier is

[11] Gillenwater v. Madison, etc., R. Co., 5 Ind. 339; Abell v. Maryland R. Co., 63 Md. 433; Railroad Co. v. Derby, 14 How. (U. S.) 486; Steamboat, etc., Co. v. King, 16 How. (U. S.) 439.

[12] Railroad Co. v. Lockwood, 17 Wall, U. S. 357; Ohio, etc., R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Ohio, etc., v. Nickless, 71 Ind. 271, Louisville, etc., R. Co. v. Faylor, 126 Ind. 126, 25 N. E. Rep. 869; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Carroll v. Missouri Pacific R. Co. 88 Mo. 239, 57 Am. Rep. 382; Saunders v. Southern Pacific Co. 13 Utah, 275, 44 Pac. Rep. 932; Illinois Central R. Co. v. Anderson. 184 Ill., 294, 56 N. E. Rep. 331; *Contra*—Meuer v. Chicago, etc., R. Co., 5 S. Dak. 598; 59 N. W. Rep. 945, 25 L. R. A. 81.

[13] Pennsylvania, Co., v. Newmeyer, 129 Ind. 401, 409; Louisville, etc., R. Co. v. Faylor, 126 Ind. 126, 25 N. E. Rep. 869; Carroll v. Missouri Pac. Ry. Co. 88 Mo. 239, 57 Am. Rep. 382; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.

[14] Indiana R. Co. v. Mundy, 21 Ind. 48.

[15] Grand Trunk R. v. Stevens, 95 U. S. 655, 24 L. Ed. 535; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360.

[16] Camden, etc., R. Co. v. Bausch (Pa.), 7 Atl. Rep. 731.

[17] Williams v. Oregon Short Line R. Co., 54 Pac Rep. 991.

[18] Boswell v. Hudson River R. Co. 18 N. Y. Sup. Ct. (5 Bosw.) 699, 10 Abb. Prac. 442; Bissel v. N. Y. Central R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Poucher v. N. Y. Central R. Co., 49 N. Y. 263, 10 Am. Rep. 364.

[19] Seybolt v. New York, etc., R. Co., 95 N. Y. 562; Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346, 353; Ohio, etc., R. Co. v. Voight, 122 Ind. 288; Illinois Central R. Co. v. Crudup, 63 Miss. 291; Mellor v. Missouri Pac. R. Co. (Mo.), 10 L. R. A. 36; Baltimore, etc., R. Co. v. State (Md.), 6 L. R. A. 706; Arrowsmith v. Nashville, etc., R. Co., 57 Fed. Rep. 165; Gleeson v. Virginia Midland R. Co., 140 U. S. 435; Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. Ed. 560.

[20] Pennsylvania R. Co.v. Price 96 Pa. St. 256; Bricker v. Philadelphia R. Co., 132 Pa. St. 1.

[21] Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346, 353; Mellor v. Missouri Pac. R. Co. (Mo.), 10 L. R. A. 36.

[22] Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346, 353; Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. Ed. 560. In Illinois Central R. Co. v. Crudup, 63 Miss. 291, it was held that a stipulation in a free ticket on which a mail agent was riding, by which he assumed all risk of injury, did not relieve the carrier from liability for injuries caused by its own negligence.

[23] Russell v. Pittsburgh, etc., R. Co. (Ind.), 61 N. E Rep. 678.

under some obligation to carry passengers free, it may, when it gives a pass as a gratuity, impose such limitations on its own liability for the negligence of its officers and agents as it may choose, and they will be binding on the person accepting and using the pass. This is the rule that is generally accepted by the courts in which the question as to the effect of a release from liability in a gratuitous pass has been directly presented.[24] It has been expressly decided that the binding force of a contract, releasing the carrier from liability contained in a gratuitous pass, is not destroyed by the fact that the person to whom the pass was given was not required to sign it, where he accepted and used it, and was injured while riding upon it.[25] But the carrier's exemption grows out of contract, and where there was clearly no binding contract on the part of the passenger, releasing the carrier from liability, a stipulation to that effect in the pass is without force. Thus, a minor, riding on a contract made by his father, by which the person traveling thereon was given free transportation for a portion of the distance, and which provided that he should assume all risk of personal injury, except from gross negligence of the carrier, is not bound by such provision, because he is incapable of making a binding contract.[26] And it has been held that an express messenger was not bound by a stipulation against liability for personal injuries on the part of the railroad company, in a contract between it and his employer, where he had no knowledge of such stipulation.[27]

The service of gratuitous carriage is clearly not within the duties which a common carrier owes to the general public, and when one whom the carrier is under no obligation to carry free accepts a pass as a pure gratuity, upon conditions therein expressed, good faith requires that if he is injured while using the pass he shall be bound by those conditions. The carrier in such a case has been likened to a bailee for the sole benefit of the bailor.[28] No one is bound to undertake a service for the sole benefit of another for which he receives no compensation, and if he does so he should be allowed to fix the terms on which he will undertake it, subject only to the general obligation to deal fairly and honestly.[29] The grounds for denying common carriers the power to make contracts limiting their liability are thus stated in a leading case.[30] "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. * * * He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could, with more reason, be said to be his private affair and no concern of the public." It is apparent that this reasoning does not apply where a person seeks to be carried free. He asks a mere favor, which the law does not require the carrier to grant, and has at all times

[24] Wells v. New York Central R. Co., 26 Barb. 641, 24 N. Y. 181; Griswold v. Railroad Co., 53 Conn. 371 4 Atl. Rep. 261, 55 Am. Rep. 215; Kinney v. Central, etc., R. Co., 32 N. J. Law. 407, 90 Am. Dec. 675, 34 N. J. Law. 513, 3 Am. St. Rep. 265; Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. Rep. 205, 5 L. R. A. 846; Rogers v. Kennebeck, etc., Co., 86 Me. 261, 29 Atl Rep. 1069, 25 L. R. A. 491; Muldoon v. Seattle, etc., R Co., 10 Wash. 311, 38 Pac. Rep. 995, 45 Am. St. Rep. 787; Payne v. Terre Haute, etc., R. Co. (Ind. Sup.), 62 N. E. Rep. 472; Annas v. Milwaukee, etc., R. Co. 67 Wis. 46, 30 N. W. Rep. 282; Chicago, etc., R. Co. v. Hawk, 36 Ill. App. 327; McCauley v. Furness R. Co., L. R., 8 Q. B. 57; Hall v. Northeastern R. Co., L. R. 10 Q. B. 37; Duff v. Great Northern R. Co., L. R. 4 Ir. 178: Alexander v. Toronto, etc., R. Co. 33 Upp. Can. 474. See, also, Western, etc., R. Co. v. Bishop, 50 Ga. 465; Railroad Co. v. Skeels, 3 W. Va. 556; Kimball v. Rutland etc., R. Co. 26 Vt. 247; Mann v. Birchard, 40 Vt. 326; Hawkins v. Great Western, etc., R. Co., 17 Mich. 57, 18 Mich. 427; Levering v. Union, etc., Co., 42 Mo. 88; Baltimore, etc., R. Co. v. Brady, 32 Md. 328.

[25] Quimby v. Boston, etc., R. Co., 150 Mass. 365, 23 N. E. Rep. 205, 5 L. R. A. 846.

[26] Chicago, etc., R. Co. v. Lee, 92 Fed. Rep. 318, 34 C. C. A. 365

[27] Chamberlain v. Pierson, 87 Fed. Rep. 420; In Coppeck v. Long Island Railway Co., 89 Hun, 186, 34 N. Y. Supp. 1038, the same rule was applied in favor of a servant in charge of some stock riding on a contract made by his employer.

[28] Annas v. Milwaukee, etc., R. Co., 67 Wis. 46.

[29] Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. Rep. 282; Chicago, etc. R. Co. v. Hauck, 36 Ill. App. 327.

[30] Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627

perfect liberty to reject free passage on the terms imposed by the carrier, and to insist on being transported on the usual terms as a fare-paying passenger. In discussing this subject the Supreme Court of Wisconsin said:[31] "We can see no good reason why the person who seeks a gratuitous carriage from a railroad company should stand in the same position to the carrier as the person who pays for his transportation, and therefore force the carrier to assume all the duties of such carriers. The carrier is in no case, under obligation of law, to carry a person gratuitously as he is when he is tendered proper compensation, and he does not therefore owe the same duty to the person carried free that he does to the person who pays for his carriage, unless he chooses to accept such duty by not stipulating against assuming it." Therefore, no principle of public policy is subverted by denying the holder of a free pass the right to repudiate his contract,[32] but there is sound public policy in holding him to it.[33] The expenses of operating a railroad are borne by the general public, that is, by its patrons who pay for its services. In so far as persons obtain the special favor of free carriage, they increase the burden on the general public, or at least postpone the day of lower rates. And if, by disavowing the agreements, which were made a condition of according them free passage, the pass-takers should be able to impose on the railroad the expense of paying for personal injuries received in taking a journey, for which nothing was paid to the railroad, they would thereby make a positive increase of disbursements to be borne by the general public.[34]

Besides, it is an evident breach of good faith[35] for a person who has made use of a pass, for which he gave no return, to repudiate his own agreement by which alone he induced the company to issue the pass, and a court should not lend its aid to defeat an agreement which good morals and common honesty demand should be kept. It has also been suggested that if the practice of giving passes be regarded as opposed to public policy, the recipients who have used such passes would have no standing to sue as passengers.[36] But in any event there can be no hardship nor injustice in holding that where persons are carried for nothing the carrier should be liable for nothing. The doctrine that, although engaged in the business of a common carrier, a person or corporation undertaking to carry passengers free may limit its liability for negligence has been expressly adopted by the courts of Connecticut,[37], New Jersey,[38] New York,[39] Massachusetts,[40] Maine,[41] Washington,[42] and Indiana,[43] and of England,[44] and Canada.[45] In Wisconsin[46] and Illinois[47] the same rule is held, but the courts have modified their declaration of the rule to except cases where the injury is due to such gross negligence as is punishable by law or clearly contrary to good morals, or which implies a willingness to inflict injury. As we have seen, such a contract only covers negligent injuries in any of the states; a person cannot, by contract, secure immunity from the consequences of his wilful misconduct, and a stipulation against liability for negligent injuries does not cover injuries caused by the violation of an express stat-

[31] Annas v. Milwaukee, etc., R. Co., 67 Wis. 46. 30 N. W. Rep. 282.

[32] Annas v. Milwaukee, etc., R. Co., Ind. 67 Wis., 46, 30 N. W. Rep. 282.

[33] Payne v. Terre Haute, etc., R. Co., (Ind.) 62 N. E. Rep. 472; Griswold v. New York, etc., R. Co., 53 Conn. 371; 4 Atl. Rep. 261, 55 Am. Rep. 115; Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. Rep. 205, 5 L. R A. 846.

[34] Payne v. Terre Haute, etc. R. Co. (Ind.), 62 N. E. Rep. 472.

[35] Griswold v. New York, etc., R. Co., 53 Conn. 37; 4 Atl. Rep. 261, 55 Am. Rep. 115; Kinney v. Central, etc., R. Co., 34 N J. Law, 513, 3 Am. Rep. 265.

[36] Payne v. Terre Haute, etc., R. Co. (Ind.), 62 N. E. 472.

[37] Griswold v. New York, etc., R. Co. 53 Conn. 371, 4 Atl. Rep. 261, 55 Am. Rep. 115; Hale v. New Jersey, etc., Co., 15 Conn. 539.

[38] Kinney v. Central, etc., R. Co., 34 N. J. Law, 513; 3 Am. Rep. 265; also 32 V. J. Law, 407, 90 Am. Rep., 675.

[39] Wells v. N. Y. Central R. Co., 26 Barb. 641, 24 N. Y. 181; Poucher v. N. Y. Central R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Ulrick v. Railroad Co., 108 N. Y. 80.

[40] Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. Rep. 205; 5 L. R. A. 846.

[41] Rogers v. Kennebeck Steamboat Co., 86 Me. 261, 29 Atl. 1069; 25 L. R. A. 491.

[42] Muldoon v. Seattle City R. Co., 10 Wash. 311, 38 Pac. Rep. 995, 45 Am. St Rep. 787.

[43] Payne v. Terre Haute, etc., R. Co. (Ind.), 62 N. E. Rep. 472.

[44] McCauley v. Furness R. Co. L. R. 8 Q. B. 57; Duff v. Great Northern R. Co., L. R. 4 Ir. 178.

[45] Alexander v. Toronto, etc., R. Co., 33 Upp. Can. 474.

[46] Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. Rep. 282.

[47] Illinois Central R. Co. v. Read, 37 Ill. 384, 87 Am. Dec. 260, Chicago, etc., R. Co. v. Hawk, 36 Ill. App. 227.

ute.[48] And the courts of Georgia,[49] West Virginia,[50] Vermont,[51] Michigan,[52] Maryland,[53] and Missouri,[54] have pronounced opinions which lend support to the contention that the rule which makes void the contracts of common carriers, exempting them from liability for negligence, does not apply to such a contract with a railroad company for which the consideration was free passage on its trains.[55] Opposed to this weight of authority are the courts of Minnesota,[56] Alabama,[57] Texas,[58] and Iowa.[59] A Pennsylvania case[60] contains some expressions that have caused it to be cited as an authority against the validity of such contracts. But, as the pass involved in that case was given to a stock drover, and the court held that the price paid for freight on the stock shipped by him included the cost of transporting the shipper, thus making him a paying passenger, it decided nothing as to the effect of contracts contained in passes given as mere gratuities. The Iowa cases[61] were based on two statutes of that state, which were held to forbid the making of any contract that would, under any circumstances, limit the liability of the carrier, and should not, therefore, be regarded as an authority outside of that state on the subject under discussion.

In the leading Texas case the court, after expressing the opinion that public policy forbids such contracts, bases its decision on the ground that the constitution of the state and the laws for the incorporation of railroad companies in Texas impose on such companies the character of common carriers of passengers and goods, and that it is not competent for such a company, by contract, to lay down its public character as a common carrier of passengers fixed upon it by law, and become a mere private carrier.[62] The Alabama case cited[63] was a suit for the loss of baggage while travelling on a free pass containing a stipulation against liability. The evidence showed that the baggage had been stolen by servants of the carrier, one of whom was convicted of the felony, while the other fled. This decision, therefore, might well have been put upon the ground that a carrier cannot, by contract, shield himself from the consequences of wilful dishonesty, rather than upon the ground that a contract against liability for negligence is void where free passage is furnished.

In addition to these cases, the Minnesota case[64] is directly opposed to the great weight of authority as stated above. In that case, the plaintiff was employed by a telegraph company to repair the telegraph lines along the defendant's right of way. The railroad company, which also used the telegraph wires in the transaction of its business under an arrangement with plaintiff's employer, gave him a pass, conditioned that, in using the same, he should assume all risks of accidents, and that the defendant should not be held liable for any negligence of its servants. Plaintiff used this pass in going from place to place to do repair work, and on one of these trips, while riding in the baggage car by permission of the trainmen, he was injured through the negligence of the company's employees by reason of being in that place. In holding that the railroad company was not relieved from liability by the condition indorsed on the pass, the court said: "There are two considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of

[48] Starr. v. Great Northern R. Co., 67 Minn. 18, 69 N. W. Rep. 632.

[49] Western, etc. R. Co. v. Bishop, 50 Ga. 465, 110 Ga. 465.

[50] Railroad Co. v. Skeels, 3 W. Va. 556.

[51] Kimball v. Rutland, etc., R. Co., 26 Vt. 247; Mann v. Birchard, 40 Vt. 326.

[52] Hawkins v. Great Western R. Co., 17 Mich. 57, 18 Mich. 427.

[53] Baltimore, etc. R. Co. v. Brady, 32 Md. 328. See Abell v. Maryland R. Co. 63 Md. 433.

[54] Levering v. Union, etc., Co., 42 Mo. 88.

[55] See also Chicago, etc., R. Co. v. Wallace, 66 Fed. Rep. 506; 14 C. C. A. 257; Express Cases, 117 U. S. 1.

[56] Jacobus v. St. Paul, etc., R. Co. 20 Minn. 125, 18 Am. Rep. 360; Starr v. Great Northern R. Co., 67 Minn. 18, 69 N. W. Rep. 632.

[57] Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 501.

[58] Gulf etc., R. Co. v. McGown, 65 Tex. 643; See Missouri Pacific R. Co. v. Ivey, 71 Tex. 409, 9 S. W. Rep. 346, 10 Am. St. Rep. 758, 1 L. R. A 500; Fort Worth, etc., R. Co. v. Rogers, 53 S. W. Rep. 366, 21 Tex. Civ. App. 605.

[59] Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Solan v. Chicago, etc., R. Co. 95 Iowa, 260, 63 N. W. Rep. 692, 28 L. R. A. 718.

[60] Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.

[61] Rose v. Des Moines Valley R. Co. 39 Iowa, 246.

[62] Gulf etc., R. Co. v. McGown, 65 Tex. 643; Fort Worth, etc., R. Co. v. Rogers, 21 Tex. Civ. App. 605; 53 S. W. Rep. 366.

[63] Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 504.

[64] Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360.

the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriæ*, has in protecting the lives and limbs of its subjects. So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can then be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reasons why these propositions are not equally applicable to passengers of either of the kinds above mentioned."[65]

In a later case[66] where a fruit vendor, who was being carried under a contract by which the railroad company was released from liability for all injuries he might sustain while on its trains was injured by reason of the violation of a statute requiring all trains to come to a stop before crossing the tracks of another road, the court quoted, with approval from the Jacobus case, the statement that one ground on which the stringent rule as to the duty and liability of carriers of passengers rests is a regard for the safety of the passenger as a citizen of the state. After setting out the Minnesota statute requiring trains to stop at crossings and making any company violating its provisions "liable in the full amount of damages done to property or person in consequence of any" such violation, the court said: "When, by express prohibitory enactments, the state has thus declared its public policy and provided a remedy for enforcing it, we do not think that it is competent for a railroad company to stipulate against this statutory liability. If it were otherwise, the state might, in its attempt to enforce a wise public policy, be completely thwarted and the law thus nullified. This right of the state to interfere in behalf of the welfare of its citizens is an important one, and ought not to be bartered away by the contract of parties, and especially by railroad companies who derive their right to operate their roads from the sovereign power. Liability upon the part of the railroad company in this respect will bring about a corresponding vigilance, and thus the safety of the citizen and protection of property be secured. We are, therefore, of the opinion that the contracts entered into, releasing the company from any liability for negligence upon its part in operating its road, were in conflict with the public policy enunciated by the statutory provisions referred to, and are void."[67]

From this review of the authorities it is evident that, except so far as state statutes and constitutions are held to be controlling, the overwhelming weight of authority is to the effect that a person or corporation doing business as a common carrier may lawfully stipulate for freedom from liability on account of negligent injuries to one whom it undertakes to carry gratuitously upon that condition, and this position is sustained not only by authority but by reason and sound principle.

Indianapolis, Ind. LOUIS B. EWBANK.

[65] Jacobus v. St. Paul, etc., R. Co. 20 Minn. 125; 18 Am. Rep. 360.

[66] Starr v. Great Northern R. Co., 67 Minn. 18, 69 N. W. Rep. 632.

[67] Starr v. Great Northern R. Co., 67 Minn. 18, 69 N W. Rep. 632.

DIVORCE—CHILD BORN AFTER DECREE—ORDER FOR MAINTENANCE.

SHANNON v. SHANNON.

Court of Appeals at Kansas City, Mo., December 1, 1902.

Rev. St. 1899, § 2926, provides that the court granting a divorce shall make proper orders touching the maintenance of the wife and of the children, and may open the decree as to maintenance. A husband was granted a divorce from his wife, and subsequently a child was born of the marriage, for whose support no provision was made in the decree of divorce. Held, that the court had authority, on petition being made therefor, to make provision for the care and custody of such child.

BROADDUS, J.: The facts of this case were that plaintiff and defendant were husband and wife prior to the 12th day of April, 1900, at which time they disagreed and separated; that afterwards the defendant herein brought suit in the Clay County Circuit Court for divorce, resulting in a decree in his favor divorcing him from his

wife, and that soon thereafter—August 9, 1901—there was born of said marriage a male child; that the divorce was granted on the statutory ground that the wife had been guilty of indignities to the husband; that she did not appear at the trial, the same being *ex parte;* that, as the child was not then born, there was no order in the decree of divorce providing for its custody and maintenance; that the respondent, as well as her parents, with whom she has resided since the separation, are without sufficient means to maintain and educate the infant, and the appellant herein has contributed nothing for that purpose; and that said appellant is a young man of good business capacity, and has a moderate estate in money and other property. Before the trial the appellant demurred to the petition for various causes, among which were that the court had no jurisdiction of the defendant or the subject-matter of the action, that the plaintiff had no legal capacity to sue, that the rights of the parties had been adjudicated in said divorce proceedings, and that there was a defect of parties plaintiff. The court overruled this demurrer, and, after hearing the evidence, decreed that defendant pay to plaintiff $30 in advance every three months, and awarded the care and custody of the child to the mother. The same questions are raised on the appeal as were raised on said demurrer.

In Rankin v. Rankin, 83 Mo. App. 335, it was held that: "Where the defendant obtained a divorce from the plaintiff under a decree making no award of the custody of the children, and which left them to the care and nurture of the former wife his liability for their support and education remained just as it had existed before the obtention of the decree." That case is similar on the facts with the one under consideration here in this: that the defendant in a former suit had obtained a decree of divorce against his wife in which there was no award of the care and custody of two of their children. The judgment was rendered in the state of Texas, where the husband had moved, and while the wife and children were in Missouri, where he had left them. In Meyers v. Meyers, 91 Mo. App. 151, it was held that: "Where the statute authorized the court awarding the custody of minor children in a divorce to the mother to make provision in the decree for their maintenance, and to change it from time to time, and no such provision is made at the time the decree is entered, the mother may, at a subsequent term, on petition, obtain an order of the court compelling the father provide her with means for its future support." See, also, *In re* Kohl, 82 Mo. App. 442. The cases cited, we think, are sufficient authority justifying the proceedings in this case in the name of the mother for the support of the minor, and the right and duty of the court rendering the original decree of divorce, and any other court of competent jurisdiction, to make at a subsequent term or terms a proper order for the support of the minor. And as the father has abandoned the minor to the care and custody of its mother, and has also imposed upon her the burden of its maintenance as well, which the law imposed upon the father, we can see no good reason why she cannot, with the aid of the court, compel him to relieve her of such burden. It is true, in a sense, that the proceeding is in the interest of the infant, but only so indirectly. Primarily and directly the cause of action is in the mother. And as her petition to the court is in her interest, to compel the father, while she is maintaining, caring for, and nurturing the child, to perform his share of such duty,—a duty not only imposed by the common law, but by the universal custom of all civilized society,—good conscience demands that she should be heard. The child was not a party to the quarrels of its father and mother, and the decree of divorce did not affect his right to maintenance at the hands of his father. Bish Mar. & Div. § 552, states the rule that "the children are no parties to the quarrels of the parents; they lose no right thereby." See, also, Chester v. Chester, 17 Mo. App. 657. And a divorce does not terminate the father's liability to support his child. Bish. Mar. & Div. § 1220. It would be a strange rule of law that would absolve the father from such liability when the decree of divorce was silent upon the matter. The appellant has cited us to two Kansas decisions in support of his contention that the plaintiff is not entitled to the relief asked for. In Harris v. Harris, 5 Kan. 46, the husband and wife were divorced by a Kansas court, at which time they had three children, the custody of which was awarded to the mother. Two days after the decree a fourth child was born. The wife brought an action of debt against the father for the entire support and education of all the children. The court held that she could not maintain the action, and that the only way for relief was by opening the decree as to the children, and making such provision for them as might be just under all the circumstances, or by other proper proceedings under or supplemental to the decree. It was also held, as between the father and mother, the duty of maintaining the children was as much that of the mother as the father; but this distinction from the common law was made by reason of a constitutional provision of the state for the equal rights of the wife as of the husband in the possession of their children. With this exception we think the ruling is in harmony with decisions of this state, for it recognizes the right of the wife to compel the husband to contribute to the support of his children "by opening up the decree as to the children, or by other proper proceedings under or supplemental to the original bill," which is equivalent to the proceedings in this case. In Hampton v. Allee, 56 Kan. 461, 43 Pac. Rep. 779, the wife predicated her right to recover for maintenance of the children on a decree of divorce. The action was also for debt. The court held, as there was no liability imposed by the decree, plaintiff was not entitled to recover; or, in other

words, she could not recover in that form of action. In Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107, the court held that: "The awarding to the mother of the custody of her minor children, on decree granting her a divorce from the father, deprives him of all right to the services of the child, and consequently frees him from all liability to the mother for the care, support, and maintenance of the child." This decision was the result of a construction of the statute of hat state to the effect that the court, in decreeing a divorce, shall make provision for the guardianship, custody, and support and education of the minor children of such marriage. Our statute regulating divorce is somewhat different, in that it provides that the court may from time to time, after the original decree, on the application of either party, alter the same as to the allowance of alimony and maintenance. Section 2926, Rev. St. Mo. 1899. In Cushman v. Hassler, 82 Iowa, 295, 47 N. W. Rep. 1036, the facts were that the child's parents had been divorced, and its care and custody awarded to the father. The child, without cause, and without the consent of the father, left him, and went to live with his mother. The mother sought to charge the father with the support of the child. The court held that the father was not liable. In Brow v. Brightman, 136 Mass. 187, it was held that the father is not liable for the support of his minor child, under the statute of the state, after its custody had been given to the mother by a decree of court. It was further held that under the laws of that commonwealth the defendant, "if of sufficient ability, was under obligation to provide for and support his infant child." And it was also held that, "the remedy to secure such provision for the support of the child as the defendant might have the ability to furnish was under a decree of this court, which it had ample authority to make, in either of the proceedings before it, as a part of the original decree, *or at any subsequent term.*" (Italics ours.) In Finch v. Finch, 22 Conn. 411, the court held that, where the decree of divorce granted on the applicatton of the wife awarded to her the custody and control of the minor children of the husband and wife, she was not entitled to recover against the father "in action of book debt for the entire support and education of such children, furnished by her after such decree had been granted." This Connecticut case is squarely in conflict with the decisions of this state. The Iowa and Indiana decisions have no application. The Kansas and Massachusetts decisions are in harmony with our own, except the case of Rankin v. Rankin, *supra*, where the proceeding was not in the nature of a supplemental bill, as the one under consideration, but was an original bill in the court of a state different from that in which the decree of divorce had been granted.

We are satisfied that the weight of authority and reason is that the court in which the decree of divorce was granted has the power at a subsequent term by motion or by supplemental bill to open the decree as to the minor children of the parties to the suit, and to make suitable orders for their care, custody, and maintenance. The policy of it is to protect the progeny of unfortunate marriages; and, while such is the case, great care should be exercised by the courts in so doing to do no injustice to either parent, and to as far as possible make such orders as will not impose a burden upon either not in harmony with justice and good conscience. An examination of the record in the cause before us has convinced us that the court below in its judgment was guided by sound discretion, and that no burden was cast upon the defendant other than that imposed by the common law.

Cause affirmed. All concur.

NOTE.—*Continuing Control of Court Over Child in Divorce Proceedings.* — Upon the proposition decided by the court in the principal case, the opinion is so well fortified by cited cases, reason and justice, that comment would seem to be superfluous. In an Ohio decision rendered forty years ago, it was held that "the jurisdiction of the Court of Common Pleas over the subject of the custody of the children in divorce cases, is a continuing one, and may on application, be invoked to modify orders originally made in respect to the custody of children whenever the character and circumstances of the case require it." Hoffman v. Hoffman, 15 Ohio St. 427. In this case it was sought to determine the custody of the child by a proceeding in *habeas corpus*, after the degree of divorce had been made, and it was there held, that if the decree was to be modified, it must be done by the court that made it, and that the proper practice would be to file a petition, setting forth the facts on the ground which the modification or further order was prayed for. In a subsequent case, this decision was approved. Niel v. Neil, 38 Ohio St. 558, and the court added that this power was a continuing one and its reservation of such power in the original order is not essential. Citing 2 Bishop on Marriage and Divorce, Sec. 530. Also that the statute of limitation had no application to such a case. In a more recent case, the same court, in case of Rogers v. Rogers, 51 Ohio St. 1, again approves its power, holding, the proper practice would be to simply file a motion in the original cause. Giving as a reason that process by motion is less likely to be attended by delays than where resort is had to petition and summons and the speediest mode, because of that fact, be the best mode. In an itermediate court of the same state, *In re* Coons, 20 C. C. 47 (1900), where the parties had been divorced and the mother to whom the custdy of the child had been given died, it was held, that the order did not extinguish the right of the father, but merely held it in abeyance so long as the welfare of the child demand it, and that the mother could not by will control the custody of the child, and further that as between the father and a third person, a writ of *habeas corpus* might be maintained, and this is true even though the original order was "until the further order of the court."

While the general rule is that no other court will interfere in the control of the child, except the one that made the decree, an addition to the exception immediately above noted, would be where the parties had become residents of another state than that which granted the decree, then in a new action, the court might fix the custody of the child according as its

welfare might demand. See Nelson on Divorce, Sec. 985. Even courts have held in such a condition of affairs, only the court making the decree of divorce could change it. Stetson v. Stetson, 80 Me. 483. In a California case, under a statute of that state, authorizing a modification of the decree, it was held that where a final decree contained no provision for the custody and care of the children, that no subsequent order could be made, compelling either party to maintain the children. Shattuck v. Shattuck, 135 Cal. 192 (1902), 67 Pac. Rep. 45. Following McCay v. McCay, 125 Cal. 65, 57 Pac. Rep. 677. In this latter case, the court say. "In jurisdiction, where procedure is not regulated by statute, but is according to the rules and practice of the court. Such authority is maintained upon the ground that when chancery has once acquired jurisdiction over the subject-matter, it will continue to exercise that jurisdiction so long, and as often as occasion shall require for the purpose of making its decree effective. * * * But where the procedure is regulated by statute, courts have not this inherent power and their jurisdiction over the subject-matter of the action * * * terminates with entry of final judgment. The judgment becomes final not only as to the matter actually determined, but also as to every other matter which the parties might have litigated." Even the reasoning here would not have been against the decision in the principal case, for there the child was not in existence at the time the decree was taken. In Florida, McGill v. McGill, 19 Fla. 341; Illinois, Chase v. Chase, 70 Ill. 572; Indiana, Sullivan v. Leamed, 49 Ind. 252, modifying Williams v. Williams, 13 Ind. 523; Iowa, Andrews v. Andrews, 15 Iowa, 423; Maine, Harvery v. Lane, 66 Me. 536; Stratton v. Stratton, 73 Me. 481; Massachusetts, Oliver v. Oliver, 151 Mass. 349; New York, Chamberlain v. Chamberlain, 63 Hun. 96, 17 N. Y. Supp. 578; Perry v. Perry, 39 N. Y. Supp. 863; North Carolina, *In re* D. Anna, 117 N. Car. 462, 23 S. E. Rep. 431, and Vermont, Buskmeister v. Buskmeister, 38 Vt. 248, 88 Am. Dec., the continuing power of the court to modify its order in reference to the case and custody of children has been maintained.

The following are cases where the power of the court was fully recognized, although its asked for modification was not always granted. Hewitt v. Long, 76 Ill. 399; Burge v. Burge, 88 Ill. 164; Umlauf v. Umlauf, 128 Ill. 378, 21 N. E. Rep. 600; Bryan v. Lyon, 104 Ind. 227, 3 N. E. Rep. 880, 54 Am. Dec. 309; Boggs v. Boggs, 49 Iowa, 190; Sherwood v. Sherwood, 59 Iowa 608, 10 N. E. Rep. 98; Johnson v. Johnson, 4 Ky. Law 446; Chandler v. Chandler, 24 Mich. 176; Flory v. Ostrom, 92 Mich. 622, 52 N. W. Rep. 1038; Eckland v. Eckland, 29 Neb. 457, 45 N. W. Rep. 466; *In re* Hackworth, 69 N. Y. 843; Koontz v. Koontz (Wash.), 65 Pac. Rep. 546; McFerran v. McFerran, 51 S.W. Rep. 307; Mansfield v. Mansfield, 54 S.W. Rep. 16.

JETSAM AND FLOTSAM.

HOW SHALL A LAWYER ADVERTISE?

In an address delivered before the Northwestern University School of Law, Hon. Mitchell D. Follansbee gave utterance to what we consider the soundest bit of advice as to the extent to which a lawyer may advertise, we have ever had drawn to our attention. After a few generalities as to the ethics of advertising, in which he warns the lawyer to remember always, that he is a member of a profession, and that because he is a member of a profession, certain things, which would be honorable enough for a tradesman to do, must not be done, Mr. Fallansbee plunges into the practical features of his subject.

The Legal Directory. — "The legal directory" says Mr. Follansbee, is the commonest form of legal advertising. The desire of members of the bar to increase their business has become so well known, that all over the country men in their vigils are planning new schemes, and making new excuses for taking from the lawyer the price of a line or a card for an advertisement. There are over 400 of these legal directories published, and while few are of any value to the practitioner, they often succeed in making the publisher happy. This advertising in the legal directories is all a matter of the last forty or fifty years, and now one may safely say that there are few firms in the country whose names do not appear in one list or another. In the 'English Law List,' which is the official organ of the bar of that country, are to be seen the cards of Alexander & Green, Evarts, Choate & Beaman, Parsons, Shepard & Ogden, of New York, and several well-known firms of this city. In the 'Scottish Law List' names of the same class appear. The same is true of the 'Irish Law List.' The Canadian firms advertise extensively. In Kines International Law Directory, a London publication, are found cards of lawyers from Cape Town, Kimberley and Pietersmaritsburg to Moscow. B. D. Milonopulu of Corfus, in Greece, advertises that he corresponds in English; Simeon Petases, Avocat, of Jerusalem, that his letters will be in Arabic; while Philip Morton, barrister at law of the Middle Temple, banished at Lahore, in the Punjamb District of India, calls attention to the fact of his proficiency in Persion and Urdu. The practice of the insertion of a card is so common, so world-wide, that it no longer attracts any adverse criticism. In any legal directory the names of from ten to 100 Chicago firms appear. * * * This sort of advertising has one advantage. It keeps a man's name before his friends in the profession, and when they have an item of business to send to his town, and take up the legal directory, or the banker's encyclopedia, or whatever list they use, they are apt to be reminded of some one they have known by seeing his name, and so send him business. Omar Khayyam asks:

> 'What is that the vintners buy
> That's half so precious as the stuff they sell?'

And in paraphrase of it I would ask:

> What is it that the printers bring
> That's half so precious as the space they sell?"

Undignified Advertising in Directories and Newspapers.—On this question Mr. Follansbee leaves out the question of ethics and shows the utter foolishness of any methods that partake of the methods of the charlatan. Mr. Follansbee says: "The professional cards inserted in these legal directories and publications and newspapers would often be amusing if they did not, in a way, reflect on the whole profession. Some of them bear the hall-marks of the charlatan, others only resemble the cry of distress. A man advertises anonymously that he will procure a divorce in exchange for a pianola or dentistry; another that he will answer three questions of law for a dollar; a third that his advice is free. But the disregard of a fundamental principle of legal dignity is usually, as Pius IX said of the marriage of a priest, 'an act which carries its own punishment with it.'

While in Cleveland, alongside of a picture of a woman with the right arm raised toward heaven, almost touching the word, "free" in large letters, we find the following modest announcement: "Divorces. —Do not apply for a divorce until you have called on

us, as we can save you the time, trouble and money. Consult us when in any trouble and it will cost you nothing, and our experience may be of inestimable value to you. The very best experienced legal talent. Divorce and accident or injury cases a specialty. Consultation free and confidential. Union Relief Co., 616 American Trust Building, Cleveland, Ohio. References." Of course, nowhere are advertisements such as I have quoted regarded as dignified or professional, and they are utterly useless. It is foolish to lose professional standing if there is no premium in it. It is too much like being a journeyman pirate with no share in the swag."

Newspaper Interviews.—"Next, after advertising," says Mr. Follansbee, "for which, of course, the advertiser pays directly, is that indirect form which aims at newspaper publicity. If a man can, by reason of his prominence, be assured that each time any question of popular interest arises, a reporter will hurry to his office or house, and between the puffs of a fine Havana cigar, ask the learned counsel his opinion on this or that, he ought to feel very much gratified. For instance, the subject of taking physical exercises arises. The reporter visits the eminent lawyer, who always lets him into the office no matter how many people are waiting, and we read in the afternoon edition that the eminent lawyer admits that he takes half an hour's walk each day, but that if from his immense practice he could possibly take an hour it would be of incalculable benefit to him. Or, there is some question concerning which the friendly reporter wants an expression of opinion, and we read in the morning that Mr. Eminent Counsel was discovered at his palatial home late in the night, and begged to say that he had not any clear opinion in the matter, but he thought there was something in the twenty-seventh Patogonia Reports which covered the point; that at any rate he would, upon going down town in the morning, set 100 office boys at work briefing the subject, and if the reporter would be good enough to call at half past ten, he would give him the result of that careful investigation. There are a good many varieties of this advertising, and each one of you can call to mind some illustration. As a practical matter it is doubtful whether newspaper notoriety is potent in building up a good clientage. If it was, there are a lot of men who would have reached affluence long ago; for many men in their time have seen their names in the head lines and their opinion referred to in editorial utterances, but their popularity and prestige seem to have been as ephemeral as the issue of the paper which exploited them, and their reputations have been made and lost before a single new client heard anything about them. That sort of publicity only impresses the man who does not know how those things are done, and that kind of a man seldom has any law business worth doing, and the man who really has law business that is worth doing, as a rule, does not care to pay to keep his attorney in the calcium light of publicity. He recognizes that living in the public eye is not necessarily the most potent in real work."

Politics as an Advertising Medium. — "There are two ways of going into politics," says Mr. Follansbee: "one as the active worker in a limited section of territory, such as a precinct, and there one may grow acquainted with a certain number of plain people, and if he is patient and a good fellow, and they like him, sooner or later those plain people, or their friends, will need, and must have, the advice and service of an attorney. The other method is to start in as an orator or spellbinder. The latter method sometimes leads the young lawyer to retainers in sensational suits; but there are so many spellbinders in the city, and so many more coming here all the time from out of town, and so few sensational suits, that oratory is hardly an employment one can count on. When it comes to office holding the lawyer is usually disappointed, and if he does hold office, though his name is before the people, he does not advance especially in his profession. The offices are few and the aspirants many, and rewards at best are scant compared with the industry which is needed. The failure of the young lawyer who goes into politics to obtain the proper sort of advertising, is because of the fact that he finds himself advertised—not as a lawyer, but as a politician, or that he becomes known as one who succeeds so little in law that he has time to devote to the duties of every right-minded citizen."

Social Acquaintance and Club Life.—On this point Mr. Follansbee says: "Some men hope to become advertised through social connections; but only in the stories written by high school girls is the young lawyer retained as he emerges from a conservatory or enters the box at the opera. The average business man would rather lend his legal friend one hundred dollars, without any clear hope of getting it back, than trust him with a ten dollar lawsuit. He will do the first thing as a matter of friendship, but when he does the second it is a matter of business, and the business man's whole training has taught him that the men who do the best work are not the men who have much time for pleasures of the rich. Of course, there are exceptions. Sometimes when a lawyer once gets a start and has an acquaintance, it is worth while to take a long trip in company with a wealthy client, or with a wealthy man who may become a client; but this is a long shot, and always expensive.

About one lawyer a day plans to increase his acquaintance by joining a club or lodge, and therefore whether you join for golf or billiards, or for fraternal insurance, you are sure to find the territory overcrowded and overworked, while the whole social fabric of this city is honeycombed with members of our profession; and there, again, the men whose business is worth while, resent the insurance agent, and the dentist brings up unpleasant memories, but of a lawyer, most of all they are cautious. If they get to know him well as a man, they respect him too highly to confess their financial embarrassments or marital infelicities, or moral delinquencies; and yet, they will bring those same troubles to a lawyer whom they do not know, without reserve.

Pretending to Be Learned or Whelmed With Business.—It was the old idea that a man ought to look like a lawyer. Fifty years ago young men copied the forehead of Mr. Webster. Later, especially in this western country, men failed to comb their hair because Matt Carpenter, of Wisconsin, did not. Boy orators come to this city every year and think that eccentricities will be mistaken for originality of mind, and that a fog horn voice will be accepted as an indication of great force of thought. It is to be noticed that as they learn the practice of the upper courts they get over the eccentricities of dress and put a soft pedal on their utterances. Like them is the man who always carries the green bag on the streets, whether he has anything in it or not, because he has heard that Boston lawyers do that, and the man who always carries a law book on street cars or surburban trains, because he thinks it will give him a reputation as a student. There are other men who succeed quite well

because through some aphasia they never talk on any but legal subjects, and that, irrespective of what any particular occasion may demand. They succeed pretty fairly well, as a rule, because they impress every one with the fact that they are lawyers and up even with the times, and that mere fact helps them. Take a young man with no striking ability and let him constantly attend all manner of bar association and legal club meetings. Sooner or later there will get to be a suspicion among those who see him in such places that he must be a lawyer, and if they see him there long enough, they get an idea that he must be a pretty good lawyer, in the same way that we figure that any old settler must have something distinctive about him. There are many assumptions of which the lawyer may be guilty. His success will depend largely on whether, when he assumes a role, he can play the part. It should always be remembered, however, that it takes a good man to choose a really good role."

Office Furniture and Methods.—There are lawyers who do not go out of their offices to advertise, and who smile at those who do. It is a trade maxim in a department store that the most important thing in selling goods is to get customers into the store, and it is figured that every customer who comes into the store will spend just about so much money, and likewise, these men argue that when a man comes into your office, it is only a question of time when he pays some of his money for your advice or efforts, and they claim that the money that is spent for this office advertising meets the best returns. In the papers and pleadings and letters that they send out, they affect scrupulous care, and their recipient concludes that the writer is careful and painstaking, and methodical. The office and the work table are orderly, and this fact argues an orderly mind. The office stationery is rich but not gaudy, which is a sign of prosperity long continued, and generally one feels that the appearance of industry accompanies the fact.

The True Test of Advertising.—It seems to me the whole test of whether advertising is effective is whether the work of the advertiser is clumsy or artistic, is coarse or smooth. The man who does course work may win for a week or a year, but he will never know the heights of professional success while the smooth man, who regards these questions delicate y and works quietly and without friction, who dispenses with the steam calliope as an unnecessary adjunct, finds that each year his profession is more of a joy, and his acts in the profession better appreciated.

There is something of a contrast between the people who are going to make things happen and who bring to the profession the tricks of the market place, and those who prefer to do business in a dignified way, a way that the great leaders of the bar have known, and which the so-called business lawyer can never understand and can never appreciate. And this significant fact remains, and I think it is the only fact of which we may be perfectly sure, that the man who does coarse work, and who is guilty of noisy advertising, whether in the country newspapers, or in the cafe of the Waldorf-Astoria, will not win enduring success.

From time to time some trial reported in the newspaper attracts the attention of everyone, and the young practitioner is asked by the barber who serves him whether a certain man is not the best lawyer in town. The barbers and men in their station of life make up their minds easily and usually on insufficient information. They reflect the average opinion of that part of the public to which litigation and ownership are unknown delights, a public never profitable. The clients who really help are the men who are strong and steady. These men will not be deceived by advertising. They will be attracted to polite gentlemen of graceful address, engaging personality, and habits of hard work, and little by little they will show their appreciation in practical ways. If the man whom they know is workmanlike, they will hear of that fact sooner or later; if he wins a difficult case, the news will get to them, even if the young man is guilty of spreading it; if he draws contracts and wills cleverly and smoothly and accurately, knowledge of that fact will also get about, until in time the lawyer will find that his clients are so many enthusiasts. They are so sure of his ability and his superiority that they are forever sounding his praises; so proud of his services, and the results those services have obtained, that each makes an especial effort to send new clients to the office, until the lawyer is beyond the need of any advertising with which he is concerned. He finds himself sitting quietly and modestly while his name is mentioned at bank boards and around the firesides as one who, by inheritance and training, is honest, thoughtful and quiet, and by industry has become strong; and the monument of such a man will not be a few envelopes of press clippings, or packages of ballots never voted, or programmes of Chautauqua assemblies, but it will be found in the reported decisions of cases in which he was victorious; in accurately drawing conveyances which have stood the test of years; and in the esteem in which he is held by families of quiet, God-fearing people, who have learned from him to place the help and friendship of the lawyer only slightly below that of the priest.

BOOK REVIEWS.

ENCYCLOPEDIA OF EVIDENCE, VOL. I.

If the complaint of the lawyer is a just one that the law is becoming such an unwieldy mass as to embarrass rather than to aid him in the solution of questions appearing before him, he certainly cannot complain that there are not a sufficient number of digests, encyclopedias and the conveniences to enable him to find what he wants. The encyclopedia seems to be the most popular of all general text-books, having superseded the general digest and ordinary text-book. For local purposes, of course, the state digest is supreme. Realizing the popularity of the encyclopedic form of legal literature publishers have been trampling over one another in the endeavor to obtain the pre-eminent and authoritive position in this regard. The latest effort is an Encyclopedia of Evidence now in preparation under the joint editorship of Edgar W. Camp and John F. Crowe, of Los Angeles, California. The preface of the first volume of this new series, which has just come from the press, states the purpose of it as follows: "This work is intended to present the rules of evidence, with the decided cases, in such form that they shall be ready for instant use when wanted. The aim is to present *all* the law of evidence, so that the practitioner may here find help on the most difficult and obscure questions, and find it readily. Instead of giving long lists of cases upon general propositions, we have differentiated the authorities: thus enabling the lawyers to turn to the precise question, or the very subdivision of the general subject which he had in hand." Over 15,000 cases are cited in volume I alone which is sufficient

to show how exhaustively this new work is attempting to cover the field it has selected. A special endeavor seems to have been made to cover ground where the lawyer finds it difficult to find previous footsteps. For instance, in the first volume, there is a little eight page article on Age. That subject to our knowledge has never before had separate treatment anywhere, and this is certainly the only place where one can find all the law as to the method of proving age. At the head of each article is a long analysis which by more than usually minutely dividing and subdividing the matter, renders the subject of evidence as contained in these volumes more readily acceptable than in any other form. The work is expected to be completed in ten volumes of 1,000 pages each. Published by L. D. Powell Company, Los Angeles, California.

HUMOR OF THE LAW.

A prominent criminal attorney had the case of a man indicted for murder, in which he was very dubious of his client's avoiding the hangman's rope. He discovered that he had an Irish friend on the jury, however, and determined to make the best of that circumstance. He succeeded in getting this Irishman's promise to do all in his power to obtain a verdict of manslaughter. When finally the jury came in and reported for manslaughter the grateful attorney and his client shook the juryman's hand vigorously and thanked him. "Yes, I brought 'em around," he said, "but I had a divil of a toime; the other eleven stood out for acquittal for siven hours."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION — Mortgage.—Where a mortgagor failed to execute a new note and mortgage for a sum less than the amount claimed, on the mortgagee's agreement to accept such new securities, there was no accord and satisfaction. — Slover v. Rock, Mo., 70 S. W. Rep. 268.

2. ACKNOWLEDGMENT — Seal. — That the probate of a deed was not sealed by the officer held immaterial, where a sealed certificate was not required by statute, either at the date of the execution or registration of the deed.—Westfeldt v. Adams, N. Car., 42 S. E. Rep. 823.

3. ADJOINING LAND-OWNERS — Lateral Support. — An owner of land, excavating by the side of his neighbor's wall, held negligent for failing to notify the neighbor of the extent of his plans.—Davis v. Summerfield, N. Car., 42 S. E. Rep. 818.

4. ADVERSE POSSESSION—Prescription.—It is error for the court to charge that permissive possession cannot ripen into a prescriptive title until the defendant asserting this possession first surrenders possession and then claims adversely.—Whelchel v. Gainesville & D. Electric Ry. Co., Ga., 42 S. E. Rep. 776.

5. APPEAL AND ERROR—Brief of Appellant.—An appeal will not be dismissed for appellant's failure to duly serve his brief on respondent's attorneys, when he made timely service on one of respondent's attorneys of record.—Sherman v. Luckhardt, Mo., 70 S. W. Rep. 388.

6. APPEAL AND ERROR — Failure to File Record. — Appellant having failed to file a record, and appellee having produced an abstract of the record, his motion to affirm will be granted. — Sone v. Giant Oaks, Mo., 70 S. W. Rep. 266.

7. APPEAL AND ERROR—Presumption on Appeal —The court on appeal cannot consider *ex parte* affidavits and a certificate of the trial court in aid of the record.—Sterling v. Self, Tex., 70 S. W. Rep. 288.

8. APPEARANCE — Objecting to Jurisdiction. — An appearance of a foreign corporation for the purpose of objecting to the jurisdiction of the court operates as an appearance to the next succeeding term of court.—Westinghouse Electric & Mfg. Co. v. Troell, Tex., 70 S. W. Rep. 324.

9. ARREST—Officer's Right to Kill.—An officer without a warrant, under Cr. Code Prac. §§ 36, 48, held not authorized to shoot a person who had committed a crime less than a felony, while fleeing to escape arrest.—Petrie v. Cartwright, Ky., 70 S. W. Rep. 297.

10. ARSON—Evidence.—On a prosecution for arson, held proper to admit evidence as to the contents of a bottle found near the place where the fire occurred, and to admit the bottle in evidence.—People v. Fitzgerald, Cal., 70 Pac. Rep. 554.

11. ATTORNEY AND CLIENT—Purchase of Claim.—Where an attorney, employed to collect a judgment, purchases it from his client, the burden is on him to show the perfect fairness of the transaction.—Stubinger v. Frey, Ga., 42 S. E. Rep. 713.

12. BANKRUPTCY—Preference.—Under bankruptcy act of 1898, a preference given a creditor by a chattel mortgage is voidable, if the instrument is recorded within four months of the bankruptcy proceedings, though executed earlier. — Babbitt v. Kelly, Mo., 70 S. W. Rep 884.

13. BANKRUPTCY—Transfer of Property.—Under Bankr. Act 1898, § 67e, relating to void conveyances by an insolvent, the question whether an insolvent paid a note before it was due with the intent to defraud his creditors held for the jury. — Sherman v. Luckhardt, Mo., 70 S. W. Rep. 388.

14. BANKS AND BANKING Power to Purchase Bonds.—Under Rev. St. U. S. § 5136 U. S. Comp. Stat. 1901, p. 3455, a national bank has power to purchase bonds issued by the board of education of a city.—Newport Nat. Bank v. Board of Education of Newport, Ky., 70 S. W. Rep. 186.

15. BANKS AND BANKING—Usury.—Where the maker of a note discounted by a national bank, bearing interest only after maturity, has paid usury to the bank, his only remedy is by action of debt under Rev. St. U. S. §§ 5197, 5198 U. S. Comp. St. 1901, p. 3493. — First Nat. Bank v. Hunter, Tenn., 70 S. W. Rep. 371.

16. BENEFIT SOCIETIES—Right of Subordinate Lodges to Waive Ruler. — Officers of subordinate lodges of benevolent societies have no authority to waive any rules forming a part of the contract of membership.—Royal Highlanders v. Scoville, Neb., 92 N. W. Rep. 206.

17. BILLS AND NOTES—Life Insurance.—A contract by a life insurance agent to issue a paid-up policy for $25,000 on payment of about $2,000, being within his authority, its breach operated as failure of consideration of a note

given in payment.—Webb v. Moseley, Tex., 70 S. W . Rep. 349.

18. BRIDGES — Pleading. — A declaration alleging a liability of the county for an injury to live stock by a defective bridge, which did not allege that the bridge was a public bridge, erected after Act Dec. 29, 1888, does not state a cause of action.—Seymore v. Elbert County, Ga., 42 S. E. Rep. 727.

19. BROKERS—Contracts of Another State.—A contract of employment to sell real estate held governed by the statute of frauds of the state where it was made.—Goldstein v. Scott, 78 N. Y. Supp. 736.

20. CARRIERS — Burden of Proof. — The burden is on a passenger, seeking to hold a carrier liable for her baggage, to prove a delivery thereof to the carrier.—Lustig v. International Nav. Co., 78 N. Y. Supp. 885.

21. CARRIERS — Failure to Stop. — Where plaintiff suffered from exposure in returning to her destination after having been carried by, by a carrier, instruction that she could not recover for sickness caused thereby held properly refused.—St. Louis S. W. Ry. Co. of Texas v. Ricketts, Tex., 70 S. W. Rep. 315.

22. CARRIERS — Fellow Servants. — An engine wiper, riding on an engine, held not a passenger.—Streets v. Grand Trunk Ry. Co., 78 N. Y. Supp. 729.

23. CARRIERS—Passes.—A signed condition on a railroad pass that the person using the same accepts "all risk of accident and damage to person and property" is void as against public policy.—Missouri, K. & T. Ry. Co. v. Flood, Tex., 70 S. W. Rep. 331.

24. CIVIL RIGHTS — Juries. — Under Code, § 1722, held, that there was an unlawful discrimination where, in the composition and selection of jurors by whom a negro was indicted and tried, all negroes were excluded.—State v. Peoples, N. Car., 42 S. E. Rep. 814.

25. COLLEGES AND UNIVERSITIES — Investigation.—Where a student, during a faculty investigation of a charge against him, deliberately bore false witness against a fellow student, for which he was expelled, he had all the investigation to which he was entitled.—Goldstein v. New York University, 78 N. Y. Supp. 739.

26. CONTRACTS — Authority to Make.—Contractor held liable on contract with materialman, though stipulations of his contract with owners as to consent of architect were not complied with.—Herry v. Benoit, Tex., 70 S. W. Rep. 359.

27. CONTRACTS—Substitution of Materials.—Where the contractor in a building contract uses different materials from those specified in the contract, the owner is entitled to damages, though the materials used be equally as good as those the contractor agreed to furnish.—Cannon v. Hunt, Ga., 42 S. E. Rep. 734.

28. CORPORATIONS — Contract of Manager. — One held entitled to recover for services rendered a corporation under contract with its treasurer and manager, who had no special authority to make the contract.—Whitman v. Koted Silk Underwear Co., 78 N. Supp. 880.

29. CORPORATIONS — Estoppel. — A plaintiff who proceeds against a defendant as a corporation is estopped to deny its corporate existence. — Etowah Milling Co. v. Crenshaw, Ga., 42 S. E. Rep. 709.

30. CORPORATIONS — Service of Summons.—Under Rev. St. §§ 995, 996, a judgment against a telegraph company held *coram non judice* on account of a defective return of service. — Rixke v. Western Union Tel. Co., Mo., 70 S. W. Rep. 265.

31. COSTS—On Appeal.—Where an objection to a judgment that the recovery is in excess of that warranted by the findings is first raised on appeal, the costs of the appeal will be adjudged against the appellant.—Herry v. Benoit, Tex., 70 S. W. Rep. 359.

32. COUNTIES — Poll Tax. — A county through its fiscal court may levy a poll tax for county purposes on citizens both inside and outside of cities or towns located therein.—Short v. Bartlett, Ky., 70 S. W. Rep. 283.

33. COURTS—Appellate Jurisdiction.—Under Const. art. 8, §§ 3, 15, the legislature has no power to limit absolutely the appellate jurisdiction to the supreme court, even to the extent of cutting off all right of appeal, but may merely enact reasonable regulations as to procedure.—Finlen v. Heinze, Mont., 70 Pac. Rep. 517.

34. CRIMINAL EVIDENCE—Res Gestæ.—In a prosecution for murder, evidence that decedent, when he was shot, exclaimed, "Lord God! I am killed!" was properly received. — Howard v. Commonwealth, Ky., 70 S. W. Rep. 295.

35. CRIMINAL LAW — Former Jeopardy. — An acquittal under an indictment charging accused with using vulgar language in the presence of a female is not a bar to a prosecution for using abusive language, though both indictments related to the same act.—McIntosh v. State, Ga., 42 S. E. Rep. 798.

36. CRIMINAL LAW — Homicide. — Where two or more persons act together with common intent to take the life of the person killed, each is responsible for any act of the other in the common purpose.—Somers v. State, Ga., 42 S. E. Rep. 779.

37. CRIMINAL LAW—Motion of Arrest of Judgment.—That an information states J. K., county attorney, presented the information, while it was signed by G. K., was no ground for a motion in arrest of judgment.—Williams v. State, 70 S. W. Rep. 213.

38. CRIMINAL LAW—Recognizance.—A recognizance on conviction of a misdemeanor does not confer jurisdiction, if it fails to state the punishment, under Code Cr. Proc. art. 887.—Hogue v. State, Tex., 70 S. W. Rep. 217.

39. CRIMINAL TRIAL — Compelling Defendant to Give Evidence.—Action of the prosecuting attorney in calling on defendant to put out his foot so that the jury might see it, while a witness was testifying as to footprints, held not erroneous, where no objection was taken.—Scott v. Commonwealth, Ky., 70 S. W. Rep. 281.

40. CRIMINAL TRIAL—Failure to Call Witness.—Where defendant's wife was summoned by the state, though it could not use her as a witness, the county attorney was entitled to comment on defendant's failure to call her.—Richardson v. State, Tex., 70 S. W. Rep. 320.

41. CRIMINAL TRIAL—Insanity.—Where insanity is relied upon as a defense, the knowledge of right and wrong is the test.—Lee v. State, Ga., 42 S. E. Rep. 759.

42. CRIMINAL TRIAL—Juror.—That a juror's name is not on the jury list or in the jury box is not cause for a new trial. Being an objection *propter defectum*, it should be urged before verdict.—Somers v. State, Ga., 42 S. E. Rep. 779.

43. CRIMINAL TRIAL—Right to Heard Before Jury.—Under the positive provision of Comp. Laws, § 2899, it was error to deny a sole defendant in a criminal case the right to be heard before the jury by two counsel.—Territory v. Sherron, N. Mex., 70 Pac. Rep. 562.

44. DAMAGES—Excessive Verdict.—A verdict of $20,000 for the loss of one eye and the subsequent weakening of the other, secured by a railroad engineer 41 years of age, whose average earnings were $160 per month, is excessive. —Missouri, K. & T. Ry. Co. v. Flood, Tex., 70 S. W. Rep. 331.

45. DAMAGES—Loss of Profits.—In an action for tort, damages for loss of profits may be recovered, if susceptible of definite ascertainment.—Paul E. Wolff Shirt Co. v. Frankenthal, Mo., 70 S. W. Rep. 378.

46. DAMAGES—Mental Distress.—Mental distress is not an element of actual damage for seizure and sale of property exempt from execution.—Morris v. Williford, Tex., 70 S. W. Rep. 228.

47. DEATH—Damages.—The statute relating to wrongful death does not limit the damages which may be awarded to children of the deceased to such as accrue during their minority.—Galveston, H. & S. A. Ry. Co. v. Puente, Tex., 70 S. W. Rep. 362.

48. DEEDS — Answer in Ejectment. — An agreement whereby a husband was to employ the father of his deceased wife to manage his ranch during the father's life held to entitle the latter to the undisturbed use and pos-

session of the premises as long as he fully complied with its terms.—Weeks v. Link, Cal., 70 Pac. Rep. 548.

49. ELECTIONS—Decision by State Convention.—Where a clear majority of a state convention of a political party voted in favor of seating the delegates of one faction, without the votes of the contesting delegates, the fact that such contesting delegates voted on the question was immaterial.—State v. Weston, Mont., 70 Pac. Rep. 519.

50. ELECTION OF REMEDIES—Waiver.—If, in attempting to make an election, one puts forth an act or commences an action in ignorance of facts which proffer an alternate remedy, his act or action is not binding.—Pekin Plow Co. v. Wilson, Neb., 92 N. W. Rep. 176.

51. EMBEZZLEMENT—Evidence.—On a trial for converting to his own use proceeds of property intrusted to him to sell, evidence that at the time of the conversion accused was in debt is admissible to show motive.—Govatos v. State, Ga., 42 S. E. Rep. 708.

52. EMBEZZLEMENT—Exchange of Property.—A person who received a horse and money to trade for another horse, but traded horse for horse and kept the money, held guilty of embezzlement.—O'Morrow v. State, Tex., 70 S. W. Rep. 209.

53. EMINENT DOMAIN—Damages.—Nothing short of actual payment to the owner of damages assessed constitutes compensation in eminent domain proceedings.—Brown v. Chicago, R. I. & P. R. Co., Neb., 92 N. W. Rep 128.

54. EQUITY—"Clean Hands."—One who voluntarily conspired with another to defeat a creditor of the latter cannot be heard to complain that his partner in the fraudulent enterprise did not keep faith with him.—Bagw v. Johnson, Ga., 42 S. E. Rep. 782.

55. ESTOPPEL—After-Acquired Property.—That an heir cannot convey his expectancy held not to preclude a subsequent title acquired by the heir from inuring to the holder of the heir's interest under a previous deed.—Johnson v. Johnson, Mo., 70 S. W. Rep. 241.

56. ESTOPPEL—Statute of Frauds.—A person who has contracted to sell realty to a corporation held estopped to avail himself of the statute of frauds, where improvements far exceeding the value of the land were made with his knowledge and participation.—Coleridge Creamery Co. v. Jenkins, Neb., 92 N. W. Rep. 123.

57. EVIDENCE—Account Books.—Account books are inadmissible in evidence as proof of an alleged debt, unless the provisions of Gen. St. 1894, § 5738, are substantially complied with.—Wimmer v. Key, Minn., 92 N. W. Rep. 728.

58. EVIDENCE—Copies of Letters.—Letter-press copies of letters sent by plaintiffs to defendants held inadmissible as secondary evidence.—Heller v. Heine, 78 N. Y. Supp. 887.

59. EVIDENCE—Declarations.—When declarations of a person in possession of real estate or some interest therein are sought to be introduced against another party, it is material to show when they were made.—Wheichel v. Gainesville & D. Electric Ry. Co., Ga., 42 S. E. Rep. 776.

60. EVIDENCE—Drunkenness.—A witness testifying to the drunken condition of a person need not qualify.—Marshall v. Riley, 78 N. Y. Supp. 827.

61. EVIDENCE—Failure to Call Witnesses.—Failure of defendant to call certain witnesses to an accident held to raise no presumption that their evidence would have been adverse to defendant.—Yula v. New York & Q. C. R. Co., 78 N. Y. Supp. 770.

62. EVIDENCE — Impeachment of Witness. — Declarations of a party to the action against his own interest may be shown, without calling his attention to the time and place of such declarations.—Dunafon v. Barber, Neb., 92 N. W. Rep. 198.

63. EVIDENCE—Injury to Employee.—A millwright held not shown to be an expert who can give his opinion as to what caused a pulley to break.—Duntley v. Inman, Poulsen & Co., Oreg., 70 Pac. Rep. 529.

64. EVIDENCE—Personal Injuries.—A witness in an action for personal injuries can testify that plaintiff appeared, after the accident, to be in pain.—Isherwood v. H. L. Jenkins Lumber Co., Minn., 92 N. W. Rep. 290.

65. EVIDENCE—Removal of Trustee.—Where trustees were alleged to have made an improvident sale of trust land, evidence as to the value of similar lands held admissible.—Belding v. Archer, N. Car., 42 S. E. Rep. 800.

66. EVIDENCE—Technical Terms. — Parol evidence is admissible to explain the meaning of technical terms in a building contract.—Cannon v. Hunt, Ga., 42 S. E. Rep. 734.

67. EXECUTORS AND ADMINISTRATORS — Trustee in Bankruptcy.—Under Comp. Laws 1897, § 9824, a trustee in bankruptcy of a daughter having an interest in the unadministered estate of her mother can be appointed administrator.—Osmun v. Galbraith, Mich., 92 N. W. Rep. 101.

68. EXEMPTIONS—Damages.—Where, in an action for levying execution on and selling exempt property, there are no special damages alleged, the measure of damages is the value of the property, with interest.—Morris v. Williford, Tex., 70 S. W. Rep. 228.

69. EXEMPTIONS—Debtor's Interest in Crop.—Where cotton has been produced by the joint use of exempt property and supplies furnished by the head of the family, not connected with such property, the whole crop is not subject to an individual debt of the head of the family.—Brand v. Clements, Ga., 42 S. E. Rep. 711.

70. FALSE IMPRISONMENT—Evidence of Good Faith.—In false imprisonment, evidence of good faith on the issue of those making the arrest is admissible on the issue of vindictive damages.—Pincham v. Dick, Tex., 70 S. W. Rep. 333.

71. FENCES—Assessment at Costs.—Sand. & H. Dig. § 1184, providing for the assessment of the costs of fencing according to the value of the land as shown by the county tax assessment, held not unconstitutional as authorizing an assessment irrespective of benefits.—Stiewel v. Fencing Board of Fencing Dist. No. 6, Johnson County, Ark., 70 S. W. Rep. 308.

72. FIRE INSURANCE—Negligence of Insured.—An insurance company cannot defend an action on a fire policy by showing that the negligence of the insured directly contributed to the loss sustained.—Scottish Union & Nat Ins. Co. v. Strain, Ky., 70 S. W. Rep. 274.

73. FRAUDS, STATUTE OF—Justice's Courts.—In replevin in justice's court, defendants, without specially pleading the statute of frauds, could rely thereon, where plaintiffs did not specially plead the contract.—Shelton v. Thompson, Mo., 70 S. W. Rep. 256.

74. FRAUDULENT CONVEYANCES—Action to Set Aside.—A creditor will not be required to exhaust statutory proceedings in aid of execution before resorting to equity to charge another creditor for chattel property of a debtor fraudulently obtained and disposed of. — Chamberlain Banking House v. Turner-Frazier Mercantile Co., Neb., 92 N. W. Rep. 172.

75. FRAUDULENT CONVEYANCES —Creditor's Suit. — A creditor has no standing in equity to question a conveyance which does not impair the security of his debt or hinder him in its collection.—Anthes v. Schroeder, Neb., 92 N. W. Rep. 196.

76. FRAUDULENT CONVEYANCES—Exempt Property.—A sale of exempt property by a debtor to his creditor is not in fraud of the other creditors.— Heisch v. Bell, N. Mex., 70 Pac. Rep. 572.

77. GARNISHMENT—Lien.—Plaintiff in garnishment acquires only such a lien as gives him the right to hold the garnishee personally liable for the property or its value.—Benedict v. T. L. V. Land & Cattle Co., Neb., 92 N. W. Rep. 210.

78. GUARDIAN AND WARD — Order to Purchase Land.—Possession by a guardian of funds belonging to his ward, under an order of court to invest them in land belonging to himself, held to create a lien on the land.—Smith's Exr. v. May, Ky., 70 S. W. Rep. 199.

79. HOMESTEAD— Estoppel. — Where the statutory requirements of signature and acknowledgment to an incumbrance of a homestead are wanting, they cannot be

supplied by estoppel of the grantors.—Davis v. Thomas, Neb., 92 N. W. Rep. 167.

80. HOMESTEAD—Waiver of Rights.— Where a wife released a homestead in a mortgage, she could not recover it after foreclosure; there being no allegation of fraud or collusion between her husband and the mortgagee.—Leamon v. Kidwell, Ky., 70 S. W. Rep. 185.

81. HOMICIDE—Justifiable Killing by Husband. — The accidental killing by a husband of his wife, in an attempt to shoot another man about to commit adultery with her, held to be no offense.—Powell v. State, Tex., 70 S. W. Rep. 218.

82. HUSBAND AND WIFE — Community Property. — Where there are community debts, and the surviving husband sells the community lands, the purchaser is not obliged to see that the proceeds of the sale are applied to the payment. — Cruse v. Barclay, Tex., 70 S. W. Rep. 358.

83. HUSBAND AND WIFE — Judgments. — It was not necessary that a judgment against a husband and wife state specifically that the separate property of the wife was liable therefor. — Smith v. Ridley, Tex., 70 S. W. Rep. 235.

84. HUSBAND AND WIFE — Mortgage on Wife's Land.— The mere fact that a husband paid off a mortgage on his wife's land held not to have given him any right to the land.—Joyner v. Sugg, N. Car., 42 S. E. Rep. 828.

85. HUSBAND AND WIFE — Purchase of Land in Wife's Name.—Where one pays the price of land and takes the title in his wife, the presumption is it was a gift. — Solomon v. Soloman, Neb., 92 N. W. Rep. 124.

86. HUSBAND AND WIFE—Separate Property.—Where a husband gave to his wife the proceeds of her dairy, it is not error to set apart to her property purchased from such proceeds.—Dority v. Dority, Tex., 70 S. W. Rep. 388.

87. INDICTMENT AND INFORMATION—File Mark. — The clerk of court may amend the signature to the file mark on an indictment. — Scrivener v. State, Tex., 70 S. W. Rep. 214.

88. INDICTMENT AND INFORMATION—Idem Sonans. — That indictment fails to designate accused by the initial of his middle name is immaterial.— Veal v. State, Ga., 42 S. E. Rep. 705.

89. INFANTS—Guardian Ad Litem. — Failure to appoint a guardian *ad litem* for infants who have, pending a contest of a will, acquired rights in the property involved, will not invalidate the judgment. — Shelby v. St. James Orphan Asylum, Neb., 92 N. W. Rep. 155.

90. INJUNCTION—Jurisdiction.—A court has no jurisdiction by a provisional injunction to transfer the possession of real estate from one litigant to another.—State v. Graves, Neb., 92 N. W. Rep. 144.

91. INJUNCTION—Picketing Store. — Members of union and friends enjoined from entering store judged unfair and interfering with trade or customers.— Foster v. Retail Clerks' International Protective Assn., 78 N. Y. Supp. 860.

92. INTOXICATING LIQUORS — Druggist. — On trial of a druggist for sale of liquor without prescription from practicing registered physician, evidence of registration of physician under whose prescription the liquor was sold held material. — State v. Morgan, Mo., 70 S. W. Rep. 267.

93. JUDGES — Disqualification. — In action for damages to land by polluting a creek, the district judge was not disqualified for "interest," under Sales, Civ. St. art. 1068, though he owned land through which the creek flowed.—New Odorless Sewerage Co. v. Wisdom, Tex., 70 S. W. Rep. 354.

94. JUDGMENT — Collateral Attack. — A judgment for taxes against the "unknown heirs" of a former owner, being void as to the owner, under grant from the deceased, he may collaterally attack such judgment. — Green v. Robertson, Tex., 70 S. W. Rep. 345.

95. JUDGMENT—Evidence.— Existence of a judgment is not established by the memoranda thereof contained in the judgment docket. — City of Red Cloud v. Farmers' & Merchants' Banking Co., Neb., 92 N. W. Rep. 160.

96. JUDGMENT— Opening Default. — A default will not be opened at the instance of a defendant unless he shows a "reasonable excuse" for failing to file an answer at the first term.—Deering Harvester Co. v. Thompson, Ga., 42 S. E. Rep. 772.

97. JUDGMENT—Presumption of Regularity. — Where a judgment confessed showed service of citation waived, the absence of an affidavit by plaintiff to the justness of his claim did not invalidate the judgment. — Smith v. Ridley, Tex., 70 S. W. Rep. 235.

98. JUDGMENT—Res Judicata. — A plea of *res judicata* is effective, where there is an identity of the subject-matter and of the parties. — Lindauer Mercantile Co. v. Boyd, N. Mex., 70 Pac. Rep. 568.

99. LANDLORD AND TENANT—Counterclaim.—Breach of covenant by a landlord to furnish steam power for the premises may be made the basis of a counterclaim in an action for rent. — Hirsch v. Olemesdahl, 78 N. Y. Supp. 882.

100. LANDLORD AND TENANT Failure to Reserve Rent. —In an action by a lessor to recover rent, the lessee may show by way of defense that the lessor has conveyed the premises to another without reserving rent. — Allen v. Hall, Neb., 92 N. W. Rep. 171.

101. LANDLORD AND TENANT—Injury to Guest of Tenant.—A landlord is not liable for injuries to the guests of a tenant, owing to the premises being out of repair, merely because he has covenants to keep them in repair. —Frank v. Mandel, 78 N. Y. Supp. 855.

102. LARCENY — Felonious Intent.— The fact that one accused of larceny secured possession of the property with the owner's consent is not conclusive of his innocence, but the question of the intent with which the possession was secured governs. — State v. Meldrum, Oreg., 70 Pac. Rep. 526.

103. LIBEL AND SLANDER — Defenses. — A charge that the person is a "skin" is not justified by the fact that he is in arrears for rent. — Christianson v. O'Neil, 78 N. Y. Supp. 757.

104. LIBEL AND SLANDER — Evidence.—Where plaintiff testified to the use of language slanderous *per se*, and defendant denied such use, the case should have been submitted to the jury.—Laury v. Evans, Minn., 92 N. W. Rep. 224.

105. LIFE INSURANCE—Agent's Commission. — Where one of two subagents claimed half the commission on a life policy written on application of the other, the general agent was not liable for such claim, if he had paid the commissions to the one forwarding without knowledge thereof.—Lane v. Raney, N. Car., 42 S. E. Rep. 820.

106. LIFE INSURANCE — Ignorance of Contents. — The reasonable time for discovering that a policy of insurance differs from the one supposed to have been applied for runs on the receipt of the policy, and a delay of 4 1-2 months in discovering the fraud is too long.—Bostwick v. Mut. Life Ins. Co., Wis., 92 N. W. Rep. 246.

107. LOGS AND LOGGING—Notice of Former Sale.— One who purchases standing trees from the owner of the land with notice of their prior sale by a former owner of the land is not an innocent purchaser for value.—Hogg v. Frazier, Ky., 70 S. W. Rep. 291.

108. MANDAMUS — School Board.— A resident citizen's school privileges may be enforced by *mandamus*.—State v. Penter, Mo., 70 S. W. Rep. 375.

109. MANDAMUS—Supreme Court.—*Mandamus* held not issuable out of the supreme court in the first instance to compel a county judge to enter of record in his court a certain judgment of the supreme court.—Fakes v. Stanley, Ark., 70 S. W. Rep. 307.

110. MARRIAGE — Annulment of Marriage. — A suit to annul a marriage is reviewable on appeal on the law and the facts.—Gross v. Gross, Mo., 70 S. W. Rep. 393.

111. MARSHALING ASSETS AND SECURITIES—Marshaling of Assets.—That a prior lien on land covered more than a subsequent one held to compel the prior lien holder to

first exhaust the land to which the subsequent lien did not extend.—Smith's Exr. v. May, Ky., 70 S. W. Rep. 199.

112. MASTER AND SERVANT — Concurrent Negligence.— The negligence of a fellow-servant does not relieve the master from liability for an injury which would not have happened had not the master been negligent. — Loveless v. Standard Gold Min. Co., Ga., 42 S. E. Rep. 741.

113. MASTER AND SERVANT — Railroad Employee. — In an action for death of railroad employee, boarding moving hand car, evidence held admissible showing custom to stop or slow up to permit persons to get aboard.—Galveston, H. & S. A. Ry. Co. v. Puente, Tex., 70 S. W. Rep. 362.

114. MECHANICS' LIENS — Liability of Owner. — Under Acts 1895, p. 225, § 18, an owner paying money to a contractor on his personal account before a materialman was paid in full is liable to the materialman for the sum so paid. — Barton v. Grand Lodge I. O. O. F., Ark., 70 S. W. Rep. 305.

115. MONOPOLIES — Action for Penalty. — Act May 25, 1899, § 12, held to impose a penalty on corporations forming combinations in restraint of trade, and the right of action therefor died with the corporation. — Mason v. Adoue, Tex., 70 S. W. Rep. 347.

116. MORTGAGES—Attachment.—The transfer of a debtor's right of redemption held to be the consideration for an obligation executed by the transferee to the debtor's wife, and being for the husband's benefit, subject to attachment by his creditors.—Potter v. Skiles, Ky., 70 S. W. Rep. 301.

117. MORTGAGES — Confirmation. — A confirmation of a note and deed of trust held to have rendered them valid, though they may originally have been forgeries or obtained while the maker was insane. — Harris v. Kiel, Tex., 70 S. W. Rep. 226.

118. MORTGAGES — Fixtures. — Where at the time of the execution of a mortgage it was understood that certain articles were not included in the mortgage, such agreement is controlling. — Richards v. Gilbert, Ga., 42 S. E. Rep. 715.

119. MORTGAGES — Homestead.—A receiver will not ordinarily be appointed to take possession of a mortgaged homestead pending foreclosure. — Sanford v. Anderson, Neb., 92 N. W. Rep. 152.

120. MUNICIPAL CORPORATIONS—Assignment of Funds. —That a city had exceeded its debt limit held to preclude the payment of claims from funds appropriated by ordinance therefor, on the theory that the appropriation constituted an assignment of the fund. — Helena Waterworks Co. v. City of Helena, Mont., 70 Pac. Rep. 513.

121. MUNICIPAL CORPORATIONS — Eminent Domain. — When a city takes possession of property for street purposes, it cannot allege its own irregularities as a reason for not paying the damages awarded. — City of Omaha v. Clarke, Neb., 92 N. W. Rep. 146.

122. MUNICIPAL CORPORATIONS — Street Assessments.— In proceedings by a contractor to enforce an improvement lien, the city was not liable for interest or costs until the apportionment was corrected, whether the contract was made under Act April 1, 1886, or under Act July 1, 1893. — City of Louisville v. Selvage, Ky., 70 S. W. Rep. 276.

123. MUNICIPAL CORPORATIONS—Welfare Clause of Ordinance. — Under the welfare clause, a municipal corporation cannot prohibit one from carrying on a lawful avocation on Christmas. — Watson v. Town of Thomson, Ga., 42 S. E. Rep. 747.

124. NAMES — Idem Sonans. — On demurrer to a plea of misnomer in a criminal case, the court may decide that the names "Witt" and "Wid" are *idem sonans*. — Veal v. State, Ga., 42 S. E. Rep. 705.

125. NEGLIGENCE — Wrongful Death. — A charge given in an action for death of railroad employee held not bad as failing to limit investigations of jury to the specific acts of negligence alleged.—Galveston, H. & S. A. Ry. Co. v. Karrer, Tex., 70 S. W. Rep. 328.

126. NEW TRIAL — Time of Hearing. — Motion for new trial, continued until the first week of court in another county, if not presented until a week thereafter, without any order of continuance taken, cannot be heard.— Whelchel v. Poor, Ga., 42 S. E. Rep. 740.

127. OBSCENITY—Public Place.—To constitute a notorious act of public indecency, within the meaning of Pen. Code, § 390, it is essential that the act should have been committed where it could have been seen by more than one person.—Lockhart v. State, Ga., 42 S. E. Rep. 787.

128. PARENT AND CHILD — Necessaries. — Arrangement with third person held not to excuse parent from liability for necessaries furnished to child by person ignorant of the arrangement.—Hazard v. Taylor, 78 N. Y. Supp. 828.

129. PARTITION — Missing Heir. — A missing heir, not shown to have died intestate, without issue, and unmarried, held a necessary party to a suit for partition, under Rev. St. 1899, § 4376. — Johnson v. Johnson, Mo., 70 S. W. Rep. 241.

130. PARTNERSHIP — Breach by One Partner.—Partners may agree that, if one wilfully fails to perform his agreed part, allowance should be made to the other therefor.— Miller v. Hale, Mo., 70 S. W. Rep. 258.

131. PARTNERSHIP — Compensation for Winding up Affairs. — Neither partner of a dissolved firm is entitled to compensation for winding up partnership affairs, unless it is expressly agreed otherwise or can be fairly implied from the circumstances. — Lamb v. Wilson, Neb., 92 N. W. Rep. 167.

132. PARTNERSHIP — Law Firm. — Member of firm for practice of law held bound by act of other member in indorsing note with firm name. — Mechanics' & Traders' Bank v. Oppenheim, 78 N. Y. Supp. 825.

133. POSSESSORY WARRANT—Recovery of Personalty.— One who intrusts personal property to an agent, with authority to use it, may, on refusal to return it, maintain proceedings by possessory warrant to recover possession under Civ. Code, § 4799 *et seq.* — Sheriff v. Thompson, Ga., 42 S. E. Rep. 788.

134. PRINCIPAL AND AGENT — Knowledge of Agent.— Where the agent of a creditor knows that the debtor is insolvent when he executes a mortgage to the agent's principal, the latter is affected with the knowledge of the agent.—Babbitt v. Kelly, Mo., 70 S. W. Rep. 384.

135. PUBLIC LANDS—Proof of Occupancy.—An applicant for the purchase of school land cannot question the sufficiency of the proof of occupancy of a prior purchaser thereof after the commissioner has issued his certificate. —Harper v. Dodd, Tex., 70 S. W. Rep. 223.

136. RAILROADS — Flying Switches. — The practice of making "flying switches" held not to constitute negligence as to employees. — Carr v. St. Clair Tunnel Co., Mich., 92 N. W. Rep. 110.

137. RECEIVERS — Right to Sue.—A receiver of a foreign corporation, appointed by the courts of the state of the corporation's domicile, held entitled to sue to recover a debt due the corporation by a resident of Kentucky in the Kentucky courts. — Hallam v. Ashford, Ky., 70 S. W. Rep. 197.

138. RECEIVING STOLEN GOODS — Indictment. — An indictment charging receiving of stolen goods held bad because not sufficient to identify the articles alleged to have been received, nor to put the accused on notice of the charge he was to meet. — Brown v. State, Ga., 42 S. E. Rep. 795.

139. RELEASE — Construction of Contract.—Payment by defendant to plaintiffs of a liquidated sum unconditionally due is not a sufficient consideration to support a release of any claim for unliquidated damages. — Harrison v. Iron Works Co., Mo., 70 S. W. Rep. 261.

140. REMOVAL OF CAUSES — Separable Controversy.— For purpose of removal to federal court, in suit to foreclose, there being parties against whom personal judgments were asked, held, that there was not a separable controversy between plaintiff and the owner of the land. —United States Mortg. Co. v. McClure, Oreg., 70 Pac. Rep. 548.

141. REPLEVIN — Exempt Property.—Under the express provisions of Code, § 4163, property cannot be replevied from an officer holding it under execution, unless exempt.—Young v. Evans. Iowa, 92 N. W. Rep. 111.

142. REPLEVIN—Stolen Property. — The rules of law with reference to the presumption arising from the recent possession of stolen property held to apply in a certain civil suit to recover possession of the property.—Cotner v. McCullough, Tex., 70 S. W. Rep. 344.

143. SALES—Breach of Warranty.— Where a vendee retains the property sold and sues for breach of warranty, he cannot recover the entire price, unless the article is worthless.—Small v. Bartlett, Mo., 70 S. W. Rep. 393.

144. SALES—Breach of Warranty.— Where an electrical motor was sold on a warranty of quality, and was wholly worthless, the purchaser was entitled to recover its entire value. — Westinghouse Electric & Mfg. Co. v. Troell, Tex., 70 S. W. Rep. 324.

145. SALES — Fraud. — Where goods are sold upon a credit obtained by material fraudulent representations of the vendee, the vendor may rescind the sale and replevy the goods within a reasonable time after the discovery of the fraud.—Pekin Plow Co. v. Wilson, Neb., 92 N. W. Rep. 176.

146. SALES—Ignoring Issues.—Where, in an action for the price, counterclaims for deceit and breach of warranty were separately pleaded, an instruction withdrawing the issue of deceit held erroneous.—Swink v. Anthony, Mo., 70 S. W. Rep. 272.

147. SHIPPING—Contributory Negligence.—In an action for injuries caused by the breaking of the fender rope, as defendant's steamer was approaching the dock, plaintiff's contributory negligence held, under the evidence, a question for the jury.— Butterfield v. Arnold, Mich., 92 N. W. Rep. 97.

148. SPECIFIC PERFORMANCES — Sale of Real Estate.— Where the vendor of realty thereafter becomes the owner, specific performance may be decreed —Coleridge Creamery Co. v. Jenkins, Neb., 92 N. W. Rep. 128.

149. STATES — Claim Against State. — Where a claim against the state is allowed in part, and the claimant accepts a warrant therefor, it is a waiver of the right to appeal.—Weston v. Falk, Neb., 92 N. W. Rep. 204.

150. STATUTES—Implied Repeal. — A general law will not be construed to repeal an existing law, unless it is manifest from the terms of the general law that such was the intention of the law-making body. — Davis v. Dougherty County, Ga., 42 S. E. Rep. 764.

151. STREET RAILROADS — Liability of Contractor. — Contractor, under a rapid transit act, must pay the cost of constructing in the subways ducts for electricity. — People v. Grout, 78 N. Y. Supp. 758.

152. SUBSCRIPTION—Parol Evidence—An instruction, in an action on a subscription, that plaintiff must establish his claim by a preponderance of evidence, and, if he does so, he can recover on the subscription, is proper. — Mefford v. Sell, Neb., 92 N. W. Rep. 148.

153. TAXATION—Enforcement— Where the statute provides a remedy for the collection of taxes under given circumstances, that remedy is exclusive of all others.—Chamberlain v. Woolsey, Neb., 92 N. W. Rep. 181.

154. TAXATION—Growing Crops.—Alfalfa held not exempt from taxation "as growing crop," under Pol. Code, § 3607.—Miller v. Kern County, Cal., 70 Pac. Rep. 549.

155. TAXATION— Illegal Purpose. — Tax levied for an illegal purpose, paid under protest, may be recovered.—Chicago, B. & Q. R. Co. v. Lincoln County, Neb., 92 N. W. Rep. 208.

156. TAXATION — Unknown Heirs. — A judgment for taxes against the "unknown heirs" of a former owner is void as to the owner under grant from the deceased, and who had no notice of the suit. — Green v. Robertson, Tex., 70 S. W. Rep. 345.

157. TAXATION—Void Assessment.—On the death of the owner of real estate, it descends to his heirs, and the assessment of the real estate in the name of the deceased person is void.—Stewart v. Board of Com'rs of Bernalillo County, N. Mex., 70 Pac. Rep. 574.

158. TELEGRAPHS AND TELEPHONES—Delivery of Telegram.—A telegraph company, delivering a message to an agent of the corporation in whose care it was directed, held not required to inform such agent of its contents.—Lefler v. Western Union Tel. Co., N. Car., 42 S. E. Rep. 819.

159. TENANCY IN COMMON—Mutual Rights.—Co-tenants refusing to join in defense of suit against one of their number for cutting timber on the land, held not entitled to share in the benefits resulting from a compromise of the suit by the defendant.—Asher v. Howard, Ky., 70 S. W. Rep. 277.

160. TRIAL — Burden of Proof. — In an action for goods alleged to have been sold and delivered to a partnership, held not erroneous as casting the burden of proof on defendant.—Lindell v. Deere-Wells, Co., Neb., 92 N. W. Rep. 164.

161. TRIAL—Expurgation of Testimony.—The remedy of a party desiring the expurgation of certain testimony is by a request for an instruction that the jury disregard it, and not by motion to strike it out. — McCoy v. Munro, 78 N. Y. Supp. 849.

162. TROVER AND CONVERSION—Value of Property.—Where, in conversion, there is no evidence as to the value of the goods to sustain the verdict, judgment based thereon will be reversed. — Liebman v. Abramson, 78 N. Y. Supp. 881.

163. USURY — Notes.—A note binding the maker to pay $235 for a loan of $200 held to be a contract stipulating for usurious interest, within Rev. St. art. 3104, defining usurious contract. — Rosetti v. Lozano, Tex., 70 S. W. Rep. 204.

164. VENDOR AND PURCHASER—Bona Fide Holder.—There is no presumption that a second grantee of land previously conveyed to another, who failed to record his deed, was a *bona fide* purchaser.—Green v. Robertson, Tex., 70 S. W. Rep. 345.

165. VENDOR AND PURCHASER—Specific Performance.—Where not otherwise expressed, it is to be presumed that land is to be conveyed within a reasonable time, and that the conveyance and payment are concurrent.—Coleridge Creamery Co. v. Jenkins, Neb., 92 N. W. Rep. 128.

166. WAREHOUSEMEN—Action by Bailor.—A warehouseman, sued for the value of goods deposited, cannot defend by merely showing that the goods were replevied.—Glass v. Hauser, 78 N. Y. Supp. 880.

167. WATERS AND WATER COURSES—Right to Maintain Dam.—It is error for the court to charge that, in order to acquire prescriptive title to the right to maintain a dam, it must have been kept at a certain place and height for over 20 years.—Welchel v. Gainesville & D. Electric Ry. Co., Ga., 42 S. E. Rep. 776.

168. WEAPONS—Accidental Shooting.—Where a boy 13 years of age pointed a pistol at plaintiff, in violation of Sanb. & B. Ann. St. §§ 4391, 4397, and the pistol was accidently discharged, defendant was liable for compensatory damages therefor.—Horton v. Wylie, Wis., 92 N. W Rep. 245.

169. WITNESSES—Impeachment.—A single witness may be introduced to impeach another witness.—Bradshaw v. State, Tex., 70 S. W. Rep. 215.

170. WITNESSES—Impeachment.—Cross-examination of accused for purposes of impeachment, as to matters not testified to by him in chief, held erroneous.—State v. Deal, Oreg., 70 Pac. Rep. 534.

171. WITNESSES—Impeachment.—On impeachment of a witness by contradictory statements, his attention must be called to the conversation, and also to the time, place, and person to whom he is supposed to have made such statements.—Dunafon v. Barber, Neb., 92 N. W. Rep. 198.

172. WITNESSES—Injury to Employee.—One testifying only in regard to the machine at which the accident occurred cannot be asked on cross-examination whether there had been other accidents in the mill.—Duntley v. Inman Houlsen & Co., Oreg., 70 Pac. Rep. 529.